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Thesis Abstract

What a Criminal Needs to Know Under Section 1319(c)(2) of the Clean Water Act: How Far Does "Knowingly" Travel? (83 pages)

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Master of Laws degree (LL.M.)
The George Washington University Law School
2001

This thesis focuses on the facts the government must prove a defendant knew in order to convict him of a knowing violation under section 1319(c)(2) of the Clean Water Act. The thesis begins with introductory comments and then discusses the status of this issue as reflected in the divergent opinions in the Courts of Appeals and how the issue has been affected by subsequent cases, and closes with a recommendation for how courts should decide this issue.

The thesis focuses on five decisions by the federal Courts of Appeals cases that have ruled on the issue of what the government must prove that a person knew in order to convict someone of a knowing violation. There is a split of opinion in the federal circuit courts with the Second, Eighth and Ninth Circuit Courts of Appeals deciding the cases in favor of the prosecution, and the Fourth and Fifth Circuits ruling in favor of the defense. The Fourth and Fifth Circuits have ruled that the government must prove that a person knew that he did not have a permit to discharge pollutants into waters of the United States; whereas the Second, Eighth and Ninth Circuits have not required proof that a defendant knew his actions violated his permit to discharge pollutants

The thesis concludes that courts should not require proof that a person knew that he did not have a permit to discharge pollutants into the waters of the United States. Criminal sanctions should be imposed on an individual who knowingly engages in conduct that results in a permit violation regardless of whether the polluter knows about the requirements of the permit or even the existence of the permit.

The key primary sources for the thesis are the cases themselves: United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), United States v. Hopkins, 53 F.3d 533 (2d. Cir. 1995), United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996), United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997), and United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

The key secondary sources are: United States v. International Minerals & Chemical Corp., 402 U.S. 601 (1971), Liparota v. United States, 471 U.S. 419 (1985), Staples v. United States, 511 U.S. 600 (1994), United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), United States v. Feola, 420 U.S. 671 (1975), United States v. Yermian, 468 U.S. 63 (1984), United States v. Bryan, 524 U.S. 184 (1998), United States v. Hanousek, 528 U.S. 1102 (2000), United States v. Murray, 52 M.J. 423 (2000), United States v. Ellis, No. 98-4150, 1999 U.S. App. LEXIS 2690 (4th Cir. Feb. 22, 1999), and United States v. Metalite Corp., NA 99-008-CR-B/N, 2000 U.S. Dist. LEXIS 11507 (S.D. Ind. July 28, 2000).

What a Criminal Needs to Know Under Section 1319(c)(2) of the Clean Water Act: How Far Does "Knowingly" Travel?

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I. Introduction

This paper focuses on what facts that the government must prove that a defendant knew in order to convict him of a knowing violation under 1319(c)(2) of the Clean Water Act.[1] This paper begins with introductory comments and then discusses the status of this issue as reflected in the split opinions in the Courts of Appeals and how the issue has been affected by subsequent cases, and closes with a recommendation for how courts should decide this issue.

Surprisingly, the concept of enforcement of water pollution statutes can be traced back over six hundred years. "In 1388, Richard II with the English parliament enacted a water pollution law designed to deal with 'Dung and Filth . . . put in Ditches, Rivers and other Waters.'"[2] The 1388 statute permitted public officials and others who felt

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[1] Title 33 U.S.C. § 1319(c)(2) is set forth as follows:

> **(2) Knowing violations**
>
> Any person who—
>
> (A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army of by a State; or
>
> (B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;
>
> shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person s for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

[2] Susan George, William J. Snape III, & Rina Rodriguez, *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. Balt. J. Envtl. L. 1, 10 (1997) (quoting The Statute of 12 Richard II, ch. 13 (1388)).

themselves "grieved" or who "would complain" to bring enforcement actions to uphold this law.[3]

In the United States, the earliest environmental legislation was enacted just over one hundred years ago. The Refuse Act of 1899[4] and the Rivers and Harbors Appropriation Act of 1899[5] were "designed as much to aid commerce as to protect the environment."[6] The Rivers and Harbors Appropriation Act of 1899 "only began to serve a pollution control function in the 1960s."[7] Modern environmental law began with the Clean Air Act Amendments of 1970[8] and the Federal Water Pollution Control Act Amendments (FWPCA) of 1972[9] which included only misdemeanor penalties.[10]

However, only 25 criminal environmental violations were federally prosecuted in the 1970s.[11] Criminal prosecution of federal environmental laws have been on the rise ever since.[12] Not until fiscal year 1990 did the United States charge 100 defendants in a single year.[13] In fiscal year 1998, a then record 350 defendants were charged, and fines in the amount of $93 million were imposed.[14]

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[3] *Id.*
[4] 30 Stat. 1152.
[5] 30 Stat. 1148.
[6] DONALD A. CARR, ENVIRONMENTAL CRIMINAL LIABILITY 5, n.42, (The Bureau of National Affairs, Inc. 1995) [hereinafter Carr].
[7] ARNOLD W. REITZE, JR., ENVIRONMENTAL LAW ENFORCEMENT, § 19-7(a) (2001) (unpublished manuscript, on file with author) [hereinafter Reitze].
[8] Pub L. No. 91-604, 84 Stat. 1676 (1970).
[9] Pub L. No. 92-500, 86 Stat. 896 (1972).
[10] Reitze, supra at § 19-1(a).
[11] Carr, *supra* at n.5, at 5.
[12] U.S. Envtl. Protection Agency, Enforcement and Compliance Assurance, FY98 Accomplishments Report, Exh A-4 (1999) [EPA 200-R-99-003].
[13] *Id.*.
[14] *Id.* at 95.

Crimes under the Clean Water Act are the hottest area in the prosecution of environmental crimes.[15] For example, of the $76.7 million in criminal environmental fines assessed in fiscal year 1996, over 81% ($62.2 million) came from Clean Water Act violations.[16] Overall, prosecutions of environmental defendants have been increasing. In fiscal year 1999, federal courts imposed a record of 208 years of criminal sentences.[17] In fiscal year 2000, a record 360 defendants were charged with federal environmental crimes, and federal courts imposed 146 years of criminal sentences.[18]

It has been predicted that the new "Bush administration is unlikely to slacken the pace of environmental enforcement."[19] The fiscal 2002 budget proposed on April 9, 2001 by President Bush would cut funding for Environmental Protection Agency enforcement activities from $326 million to $288 million and eliminate 223 enforcement positions at the agency.[20] "However, funding for criminal enforcement would rise by $1 million to $42 million."[21] Only time will tell whether the upward trend in environmental crime enforcement will continue.

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[15] Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Aug. 24, 2000). In his Environmental Law Enforcement Lecture at the George Washington University Law School on March 20, 2001, Professor Arnold W. Reitze, Jr. referred to Ray Mushal as the "father of criminal environmental law." Mr. Mushal is a Senior Counsel with the Environmental Crimes Section of the Environment and Natural Resources Division of the United States Department of Justice.

[16] *Record $76.7 Million in Criminal Fines Assessed by Agency During Fiscal Year 1996, EPA Reports,* 27 Env't Rep (BNA) 2174 (Feb. 28, 1997).

[17] U.S. Envtl. Protection Agency, Enforcement and Compliance Assurance, FY99 Accomplishments Report, Exh B-3 (2000) [EPA 300-R-00-005].

[18] U.S. Envtl. Protection Agency, Environmental News, *EPA Releases FY 2000 Enforcement and Compliance Assurance Data* (Jan. 19, 2001).

[19] This prediction was made by Judson W. Starr, former Chief of Environmental Crimes Section of DOJ's Environment and Natural Resources Division, on January 9, 2001 while speaking at a forum on the challenges facing new decisionmakers at DOJ. *Incoming Administration Will Not Slacken on Enforcement, Former DOJ Official Says,* 33 Env't Rep (BNA) 96 (Jan, 12, 2001).

[20] *Bush Proposal Would Cut EPA Enforcement; Compliance Office Could Lose 223 Positions,* 70 Daily Environment Report (BNA), A-1 (Apr. 11, 2001).

[21] *Id.*

II. 33 U.S.C. § 1319(c)(2)

Most federal criminal environmental statutes require a "knowing" form of *mens rea.*[22] Since environmental crimes are creatures of statute, there is no common law in this area.[23] According to one of the nation's most experienced prosecutors of environmental crimes, *mens rea* is the toughest element of proof in environmental crimes.[24] However, it is generally perceived that the case law on *mens rea* in environmental cases is "decidedly pro-government."[25] One commentator framed the legal issue as "whether the bare fact that an industrial process is subject to regulation provides sufficient notice to an operator of a particular action's illegality, when the substantive standards are frequently complicated and arcane."[26] This general sentiment seems to be the prevailing opinion in the literature.[27]

Before the 1987 amendments, the Clean Water Act had only a single offense—to willfully or negligently violate the Act.[28] In 1987, Congress amended the Clean Water Act to create a misdemeanor for negligent violations and a felony for knowing violations.[29] While Congress in 1987 reduced the *mens rea* required for a conviction

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[22] Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Aug. 24, 2000); *see* 33 U.S.C.S § 1319(c)(2) (LEXIS 2001) (Clean Water Act); 42 U.S.C.S. § 9603(b) (LEXIS 2001) (CERCLA); 42 U.S.C.S. § 6928(d) (RCRA); 42 U.S.C. S. § 7413(c) (LEXIS 2001).

[23] Mushal, *supra.*

[24] *Id.*

[25] DAVID S. KRAKOFF, THE ENVIRONMENTAL CRIMES CASES: FROM PRETRIAL PROCEEDINGS TO SENTENCING GUIDELINES 78 (Gary S. Lincenberg & David S. Krakoff eds., American Bar Association 1999).

[26] JOHN F. COONEY ET AL., ENVIRONMENTAL CRIMES DESKBOOK 23 (The Environmental Law Institute 1996).

[27] *See generally,* Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime,* 27 Loy. L.A. L. Rev. 867, 887-889 (1994) (discussing problems of assimilating environmental goals with criminal law); David Gerger, *Environmental Crime: An Analysis of "Fair Notice" and "Intent,"*63 Tex. B.J. 746 (2000). *But cf.* Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal,* 23 Colum. J. Envtl. L. 217 (1998).

[28] *See* 33 U.S.C.S. § 1319(d)(1) (LEXIS 2001).

[29] *See* 33 U.S.C.S § 1319(c)(1)(A) (LEXIS 2001) for negligent violations and 33 U.S.C.S. § 1319(c)(2)(A) (LEXIS 2001) for knowing violations.

from "willfully" to "knowingly," it increased the maximum sentence to confinement from one year to three years and increased the maximum fine from $25,000 per day of violation to $50,000 per day of violation."[30] Congress determined that elevated penalties were necessary to deter would-be polluters.[31] Additionally, the House report stated that the changes were to "provide penalties for dischargers or individuals who knowingly or negligently violate or *cause the violation* of certain of the [Clean Water] Act's requirements."[32] Along with the increased penalties came a surge in prosecutions and the proliferation of criminal enforcement case law.[33]

Pursuant to the new section 1319(c)(2), any "person"[34] can be held criminally liable for knowing violations of any of the Clean Water Act's major substantive requirements, such as failure to obtain a permit, failure to obey all permit conditions, failure to properly monitor discharges, and failure to maintain monitoring records. Section 1319 also makes it a crime under the Clean Water Act to knowingly make false material statements in any document filed or required to be maintained under the statute, or to knowingly falsify, tamper with, or render inaccurate any monitoring device on method required to be maintained under the statute.[35]

One element that makes the criminal prohibitions of the Clean Water Act seem more complicated than most other criminal statutes is that while most statutes allow anything that is not prohibited, the Clean Water Act prohibits all regulated conduct

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[30] Compare Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) and 33 U.S.C. 1319(c)(2) (1987).
[31] S.Rep. No. 50, 99th Cong., 1st Sess. 29 (1985).
[32] H.R. Rep. No. 189, 99th Cong., 1st. Sess. 29-30 (1985) (emphasis added).
[33] *See supra* at 2; *infra* at 7.
[34] In this context, "(t)he term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C.S. § 1362(5) (LEXIS 2001). Furthermore, "any responsible corporate officer" is a "person" for crimes under the Clean Water Act. 33 U.S.C.S. § 1319(6) (LEXIS 2001).

involving navigable waters except what is specifically permitted.[36] One commentator has noted that taken to its logical extreme, the Clean Water Act "is violated by a father (person) taking rocks (pollutant) from a container (point source) in order to teach his son to skip (discharge) rocks in a stream (navigable waters of the United States) without a permit (not in compliance with the permit requirements)."[37] Of course, common sense and the political reality of public outrage prevent the government from prosecuting such technical violations. To be successful, prosecutors "have an incentive to investigate and prosecute conduct that is illegal for reasons that are clear and evidence, rather than cloudy, overly technical, or arcane."[38]

In 1980, the current Chief Justice of the United States acknowledged that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime."[39] Recently, the Chief Judge of the United States Court of Appeals for the Armed Forces noted that "ascertaining which terms or elements of the offense the *mens rea* modifies can be a complicated task" for any crime that requires a particular mental state.[40] As will be seen later in this paper, courts have encountered the

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[35] 33 U.S.C.S. § 1319(c)(4) (LEXIS 2001).

[36] 33 U.S.C.S. § 1311(a) (LEXIS 2001). "Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* Courts have recognized that "[m]uch more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine." United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993).

[37] Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section 1319(c)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law,* 23 Ecology L.Q. 447, 452 (1996). *But see* United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d. Cir. 1993) (Since "the term 'point source' as applied to a human being is at best ambiguous," under the rule of lenity, a human being is not a "point source.") Under the hypothetical given, it is more likely that the father would be considered the point source than the container. If the father poured the rocks into the water then the container would clearly be the point source.

[38] Lois J. Schiffer and James F. Simon, *The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus,* 83 Geo. L.J. 2531, 2533 (1995).

[39] United States v. Bailey, 444 U.S. 394, 403 (1980).

[40] United States v. Binegar, 55 M.J. 1, 10 (2001) (Crawford, C.J., dissenting).

same difficulty when interpreting which elements of the offense are modified by the *mens rea* of "knowingly" in section 1319(c)(2) of the Clean Water Act.

What is not clear from the text of the statute is what facts the government must prove that a person knew to sustain a conviction. Must a person know that statutory law prohibits the act? Must a person know that the act required the issuance of a permit? Must a person know that his action exceeded the limits of the permit? Must a person know that he discharged a pollutant into a water of the United States? Must a person know that the substance discharged is a pollutant? Must he know that he used a point source to discharge a pollutant? To complicate matters, the statute does not define the term "knowingly," and the legislative history does not shed light on Congress' intent concerning what the prosecution must prove a person knew in order to sustain a conviction.

Further complicating the *mens rea* issue in Clean Water Act prosecutions is that requisite criminal intent—*mens rea*—is always a challenging issue in prosecutions. This has led to a split in the federal circuit courts of appeals on the issue of requisite criminal intent. Generally, the Second, Sixth, Eighth and Ninth Circuit Courts of Appeal require that the government only prove that the defendant knew of the prohibited act.[41] To the contrary, the Fourth and Fifth Circuit Courts of Appeals have decided that the government must prove much more than just the defendant's knowledge of the prohibited act.[42]

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[41] United States v. Hopkins, 53 F.3d 533 (2d. Cir. 1995), *cert. denied,* 516 U.S. 1072 (1996); United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 n. 4 (6th Cir. 1998) (dicta in a case involving a prosecution under RCRA); United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995).

[42] United States v. Wilson, 113 F.3d 251 (4th Cir. 1997); United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996); United States v. Ellis, No. 98-4150, 1999 U.S. App. LEXIS 2690 (4th Cir. Feb. 22, 1999).

III. Supreme Court Precedent on Public Welfare Offense Doctrine

A. Public Welfare Offense Doctrine

Before discussing the Clean Water Act prosecutions, a review of the United States Supreme Court jurisprudence on the public welfare offense doctrine should be useful. Brief examples may be helpful in explaining the Supreme Court's application of the "public welfare offense" doctrine. Keep in mind, the pertinent question is whether the criminal provisions of the Clean Water Act should be considered as "public welfare offenses."

The U.S. Supreme Court has recognized offenses as "public welfare offenses" when Congress criminalizes conduct that "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[43] The U.S. Supreme Court has defined a "public welfare offense" as an offense that "depend[s] on no mental element but consist[s] only of forbidden acts or omissions."[44] The "public welfare offense" doctrine has been referred to as a "rationale upon which courts have excused a knowledge requirement as it applies to awareness of duties imposed by the law, regulations or a permit."[45] Additionally, the Court has stated that a severe penalty is an indicator that Congress did not intend to dispense with a *mens rea* requirement and apply the "public welfare offense" doctrine.[46]

Thirty years ago, the Supreme Court relied on the "public welfare offense" doctrine to uphold a conviction for possession of a unregistered hand grenades by holding that the prosecution does not have to prove that the recipient of unregistered hand

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[43] *Liparota,* 471 U.S. at 433.
[44] *Id.* at 432 (quoting Morissette v. United States, 342 U.S. 246, 252-53 (1952)).
[45] United States v. Metalite Corp., NA 99-008-CR-B/N, 2000 U.S. Dist. LEXIS 11507 (S.D. Ind.,July 28, 2000) at *12.

grenades knew that they were not registered.[47] The Court reasoned that it should come as no surprise "that possession of hand grenades is not an innocent act."[48] Nearly fifty years ago, in another "public welfare offense" case, the Supreme Court upheld a corporate officer's conviction under the Food, Drug, and Cosmetic Act when his corporation shipped adulterated and misbranded drugs even without proof that the corporate officer knew that the drugs were adulterated and misbranded because he stood "in responsible relation to a public danger."[49]

The following cases discuss the "public welfare offense" doctrine as the U.S. Supreme Court applied it to criminal provisions other than those contained in the Clean Water Act. Since these cases have been heavily relied upon by the United States Courts of Appeals in subsequent prosecutions under the Clean Water Act, they merit discussion.

B. United States v. International Minerals & Chemical Corp.[50]

United States v. International Minerals & Chemical Corp. has been cited as "the leading case" in the area of "public welfare offenses."[51] Ironically, the U.S. Supreme Court never used the phrase "public welfare offense" or any variant thereof in its 1971 opinion. However, over a decade later, the Court cited *International Minerals* as a "public welfare offense" case.[52]

The International Minerals and Chemical Corporation was charged with shipping sulfuric acid and hydrofluosilicic acid in interstate commerce and knowingly failing to show on shipping papers the required classification of the acid in violation of a

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[46] Staples v. United States, 511 U.S. 600, 618 (1994).
[47] United States v. Freed, 401 U.S. 601, 609 (1971).
[48] *Id.* at 609.
[49] United States v. Dotterweich, 320 U.S. 277, 281-84 (1943).
[50] 402 U.S. 558 (1971).
[51] *Weitzenhoff,* 35 F.3d at 1284.
[52] *See* United States v. Liparota, 471 U.S. 414, 433 (1985).

Department of Transportation regulation for the safe transportation of corrosive liquids.[53] The corporation was charged under section 834(f) of Title 18 of the United States Code that punished whoever "knowingly violated any such regulation."[54] "[A]ny such regulation" referred to any Department of Transportation regulation formulated "'for the safe transportation' of 'corrosive liquids.'"[55]

The Supreme Court construed the word "regulation" as "a shorthand designation for specific acts or omissions which violate the Act."[56] By so viewing the word "regulation," the Court interpreted the statute in a manner consistent with the rule of law that ignorance of the law is no excuse thereby putting the burden of compliance squarely on the shipper.[57] In doing so, the Court did not indicate that its interpretation was based on concerns that the statute and regulation at issue constituted a "public welfare offense."[58]

Thus, the United States Supreme Court in *International Minerals* established that there was no ignorance of the law defense, and that the government was not required to prove the defendant knew of the regulation and appreciated that his conduct violated it.[59] Instead, the Court held that the government must prove the defendant was aware of the operative facts that are the essential elements of the regulatory violation.[60] The shipper was required to know the operative regulations. In so holding, the Court preserved

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[53] United States v. International Minerals & Chemical Corp., 402 U.S. 558, 559 n.1 (1971) (citing 49 C.F.R. § 173.427). The Supreme Court did not otherwise discuss the facts of this case regarding the defendant's misconduct.
[54] *Id.* at 559.
[55] *Id.* (quoting 18 U.S.C. § 834(a)).
[56] *Id.* at 562.
[57] *Id.*
[58] *See* nn.50-52 and accompanying text, *supra.* As stated previously, the Court never used the phrase "public welfare offense" or any variant thereof in its opinion.
[59] *International Minerals,* 402 U.S. at 563-64.
[60] *Id.*

mistake of fact defenses and did not impose true strict liability. As the Court indicated, "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered."[61] Noting the general rule that ignorance of the law is no excuse, the Supreme Court refused the "inaccurate view" that Congress by using the word "knowingly" would require proof of knowledge of the law, as well as the facts.[62]

The U.S. Supreme Court in *International Minerals* also briefly distinguished the *mens rea* of "knowingly" from that of "willfully" by stating that "willfully" "include[s] a purpose to bring about the forbidden result."[63] The Court concluded that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is possession of them or dealing with them must be presumed to be aware of the regulation,"[64] i.e., he must know. However, the Court stated that the regulation of innocuous items such as "[p]encils, dental floss, [and] paper clips" "might raise substantial due process questions" unless Congress requires [a knowing] "'*mens rea*' as to each ingredient of the offense."[65] The Court did not require that the *mens rea* requirement attach to every element of the charged offense of knowingly failing to show on the shipping papers the required classification of sulfuric acid and hydroflueosilcic acid in violation of the Department of Transportation regulation.[66]

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[61] *Id.*
[62] *Id.* at 563.
[63] *Id.* at 564.
[64] *Id.*
[65] *Id.* at 564-65.
[66] *Id.* at 559.

Thus, in discussing innocuous items, the Court was dealing with shipping regulations. It makes sense that due process concerns could rise from prosecutions in shipping common household items unless a *mens rea* requirement attached to each element of the offense. The shipping of innocuous items is not the same as the discharge of harmful pollutants into the nation's waters. It seems to be common sense that people should be wary about discharging pollutants into the public waters, however, it is not at all clear that people should be wary about transporting innocuous items. Therefore, pursuant to *International Minerals,* the environmental crimes under section 1319(c)(2) should be considered to be public welfare offenses.

C. Liparota v. United States[67]

Polluters often cite *Liparota v. United States* as authority for the proposition that the government must prove that the defendant knew his conduct was illegal. However, polluters have been unsuccessful.[68]

At trial, the evidence showed that Liparota, a store owner, purchased food stamps on three occasions from an undercover agent for a price substantially less than their face value.[69] He was charged with unlawfully acquiring and possessing food stamps under 7 U.S.C. section 2024(b)(1).[70] The statute punished "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [the statute] or the regulations."[71]

The trial judge declined to give Liparota's proposed jury instruction that would have stated the Government had to prove that Liparota "knowingly did an act which the

[67] 471 U.S. 419 (1985).
[68] *See, e.g., Weitzenhoff,* 35 F.3d at 1283, *Wilson,* 133 F.3d at 262-63.
[69] *Liparota,* 471 U.S. at 421.
[70] *Id.* at 420.

law forbids, purposely intending to violate the law."[72] Concluding that the food stamp statute involved a "knowledge case" rather than a "specific intent crime," the trial judge instructed the jury that the Government had to prove that Liparota acquired and possessed the food stamps in a manner not authorized by statute or regulations and that he knowingly and willfully acquired the food stamps.[73] Liparota was convicted, and the Seventh Circuit Court of Appeals affirmed the conviction.[74]

The Government argued that Liparota "violated the statute if he knew that he acquired or possessed food stamps and if in fact that acquisition or possession was in a manner not authorized by statute or regulations."[75] The Government also argued that the statute did not impose a *mens rea* requirement.[76] However, the U.S. Supreme Court reversed and held that the government had to prove that the defendant knew that his acquisition or possession of food stamps was unauthorized—contrary to law or regulation—in order to prove a violation of the food stamp statute.[77] In so concluding, the Court noted that nothing in the legislative history of the statute clarified congressional intent.[78] Without requiring proof of knowledge that the act was unauthorized, the result would have been to criminalize many acts that a reasonable person would very likely believe were completely innocent.[79] For example, "a nonrecipient of food stamps who 'possessed' stamps because he was mistakenly sent them through the mail due to an administrative error, 'altered' them by tearing them up, and 'transferred' them by

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[71] *Id.* at 420, n.1 (quoting 7 U.S.C. § 2024(b)(1)).
[72] *Id.* at 422.
[73] *Id.*
[74] *Id.* at 423, 433.
[75] *Id.* at 423.
[76] *Id.*
[77] *Id.* at 425.
[78] *Id.* at 424-25.
[79] *Liparota,* 471 U.S. at 425.

throwing them away" would be rendered criminal.[80] The Supreme Court concluded that although it did not provide a mistake of law defense, the evidence of Congress' intent to create such harsh results was insufficient to justify the interpretation urged by the Government as stated above.[81]

The U.S. Supreme Court added that requiring Liparota to know that he was violating the food stamp statute is consistent with the rule of lenity that "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[82] The rule of lenity is the longstanding principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[83] It applies whenever Congress' intent is not clear.[84]

An exception to this general rule is the knowledge required for public welfare offenses. The U.S. Supreme Court defined "public welfare offense" in *United States v. Morissette* as "depend[ing] on no mental element but consist[ing] only of forbidden acts or omissions."[85] The Court explained that "[i]n most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[86] The Court distinguished food stamp offenses at issue in *Liparota* from a definition of public welfare offenses as those that put at risk community health and

[80] *Id.* at 426-27; *see* footnotes 75-76, *supra.*
[81] *Id.* at 425 n.9.
[82] *Id.* at 427.
[83] *Id.* (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).
[84] *Id.*
[85] *Liparota,* 471 U.S at 432 (quoting *Morissette,* 342 U.S. at 232-33).
[86] *Id.* at 433.

safety.[87] According to the U.S. Supreme Court, a food stamp can hardly be compared to a hand grenade, and the selling, unauthorized receipt or possession of food stamps cannot be compared with the sale of adulterated drugs.[88]

In closing, the Court assured the Government that its holding "does not put an unduly heavy burden on [it]" because "the Government need not show that [a defendant] had knowledge of specific regulations governing food stamp acquisition or possession."[89] The Government can prove that a defendant knew that his conduct was unauthorized by circumstantial evidence such as the circumstances surrounding the defendant's acquisition of the food stamps.[90] In *Liparota,* this would be the difference between the amount paid and the much greater face value of the food stamps.

It is not difficult to understand why courts have not permitted defendants to successfully rely on *Liparota* for the proposition that ignorance of the law is an excuse in environmental cases. Offenses that fall into the category of public welfare offense include conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. Arguably, it is well known that the discharge of pollutants into the nation's waters is highly regulated by the Clean Water Act for environmental and public health reasons. Certainly, the food stamp offenses at issue in *Liparota* do not involve the same threat to public safety as violations of the Clean Water Act.

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[87] *Id.*
[88] *Id.* at 433 (citing United States v. Freed, 401 U.S. 601 (1971) (hand grenade) and United States v. Dotterweich, 320 U.S. 277 (1943) (adulterated drugs)).
[89] *Id.* at 433-34.
[90] *Id.* at 434.

D. Staples v. United States[91]

In *Staples v. United States,* the United States Supreme Court painted a fine line between what it considers to be a public welfare offense and what is not. As will be seen later in this paper, the Fifth Circuit Court of Appeals has relied on *Staples* to hold that criminal provisions of the Clean Water Act are not public welfare offenses.

Harold Staples was convicted of violating The National Firearms Act[92] by possessing a machine gun that was not properly registered with the federal government.[93] Under the statute, a "firearm" is any fully automatic weapon.[94] The offense carried a maximum term of imprisonment of 10 years.[95] The judge sentenced Staples to probation for five years and a $5,000 fine.[96]

Local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) found an AR-15 rifle in Staples' home while executing a search warrant.[97] The AR-15 is the civilian version of the military's M-16 rifle and is a semiautomatic weapon unless it is modified.[98] Unlike the AR-15, the M-16 allows the operator to choose automatic or semiautomatic fire.[99] Interchangeable parts can be used to convert an AR-15 into an M-16.[100] To discourage such conversions, the AR-15 has a metal stop on its receiver that prevents an M-16 selector switch, if installed, from rotating from semiautomatic to the fully automatic position.[101] However, the metal stop on Staples' AR-15 had been filed

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[91] 511 U.S. 600 (1994).
[92] *Staples,* 511 U.S. at 602 (citing 26 U.S.C. §§ 5801-5872).
[93] *Staples*, 511 U.S. at 602.
[94] *Id.* at 602 (citing 26 U.S.C. § 5845(b)).
[95] *Id.* at 602-03 (citing 26 U.S.C. § 5861(d)).
[96] *Id.* at 604.
[97] *Id.* at 603.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

away and rifle was modified with an M-16 selector switch and other M-16 parts.[102] As found, the gun had the ability to fire more than one shot with a single pull of the trigger, i.e., it was a machine gun.[103]

At trial, the fact that the machine gun was not registered was undisputed.[104] However, Staples alleged ignorance of the machine gun's automatic firing capability and argued that his ignorance shielded him from criminal liability.[105] He asked the trial court to instruct the jury that the Government must prove that he "knew that the gun would fire automatically" in order to convict him.[106] The trial judge refused this instruction and instead instructed:

> The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic which subjects it to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.[107]

The Government argued that a presumption of *mens rea* should not be required in this case because the statute fell into the category of "public welfare" offenses since it was intended to restrict the circulation of dangerous weapons.[108] The Court, disagreeing with the Government's contention and discussing public welfare statutes stated "we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense" in that the statutes "do not require the defendant to know the facts that make his conduct illegal."[109] "Such legislation dispenses with the conventional

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at 603-04.
[107] *Id.* at 604.
[108] *Id.* at 606.
[109] *Id.*

requirement for criminal conduct—awareness of some wrongdoing."[110] The Court noted that its cases recognizing public welfare offenses that do not require a *mens rea* finding typically "involve statutes that regulate potentially harmful or injurious items."[111] In those cases, "as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' he should be alerted to the probability of strict regulation."[112] Furthermore, the Court has assumed that "Congress intended to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibition of the statute.'"[113]

The U.S. Supreme Court held that to obtain a conviction for possession of an unregistered firearm, the government must prove that a defendant knew of the features of his weapon that brought it within the scope of the act, specifically, that it had automatic firing capability.[114] The Court so held even though no *mens rea* requirement was included in the relevant statute.[115] The Court did so because courts disfavor offenses that do not require *mens rea* absent some indication of express or implied congressional intent.[116]

However, the Court emphasized its holding was narrow.[117] The Court indicated that its "reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations

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[110] *Id.* at 606-07 (quoting United States v. Dotterweich, 320 U.S. 277, 280-81 (1943)). In a footnote, the Supreme Court acknowledged that public welfare offenses are not truly strict liability because the Government must prove that the defendant knew that he was dealing with a dangerous item. More accurately stated, under public welfare offenses, the Supreme Court has "not required that the defendant know the facts that make his conduct fit the definition of the offense." *Id.* at 607, n. 3.
[111] *Id.* at 607.
[112] *Id.* (quoting *Dotterweich,* 320 U.S. at 281).
[113] *Id.* (quoting United States v. Balint, 258 U.S. 250, 254 (1922)).
[114] *Id.* at 619.
[115] *Id.* at 619 (citing 26 U.S.C. § 5861(d)).
[116] *Staples,* 511 U.S. at 606.

that individuals may legitimately have in dealing with the regulated items."[118] The Court noted that "if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect."[119]

Critical to the Court's holding was its application of what it called the "firmly embedded" requirement that the government must prove some *mens rea* for a crime even when the statute does not include a *mens rea* requirement.[120] This "*mens rea* presumption[121] requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to a criminal prosecution.'"[122]

In refusing to categorize the offense of unregistered possession of a machine gun as a public welfare offense, the U.S. Supreme Court emphasized the "particular care" it has taken to "avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[123] Virtually any semiautomatic weapon may be converted into a machinegun within the meaning of the Act by internal modification or even by simple wear and tear without any externally

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[117] *Id.* at 619.
[118] *Id.*
[119] *Id.* at 620.
[120] *See id.* at 605-06.
[121] The Staples Court observed "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Id.* at 605 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 436-37 (1978)). Additionally, the Staples Court stated that in order to dispense with *mens rea* as an element of a crime, there should be some express or implied indication of Congress' intent to do so. *Id.* at 606.
[122] *Id.* at 622 n.3 (1994) (Ginsburg, J., concurring) (quoting Cheek v. United States, 498 U.S. 192, 199 (1991)).
[123] *Id.* at 610 (quoting *Liparota,* 471 U.S. at 426).

visible indication that it is fully automatic and therefore prohibited unless registered.[124] Since a gun owner who believes he possesses a semiautomatic because of its external appearance could actually possess an automatic weapon in violation of the statute, the Court was unwilling to adopt the Government's view that such a person is criminally liable under the statute.[125] The Court assured the Government that it would "not face great difficulty" in proving that a defendant knows of the characteristics of the firearm that bring it within the scope of the Act because "circumstantial evidence, including any external indications signaling the nature of the weapon" can be used to infer a defendant's knowledge of the gun's automatic firing capability.[126]

The Supreme Court "took pains to contrast the gun laws to other regulatory regimes, specifically those regulations that govern the handling of obnoxious waste materials."[127] The Supreme Court indicated "there is a long tradition of widespread lawful gun ownership by private individuals in this country."[128] Furthermore, "[g]uns in general are not deleterious devices or products or obnoxious waste materials that put their owners on notice that they stand in responsible relation to a public danger."[129] "[D]espite their potential for harm, guns generally can be owned in perfect innocence."[130] Gun owners are not "sufficiently on notice of the likelihood of regulation to justify interpreting section 5861(d) as not requiring proof of knowledge of a weapon's characteristics."[131]

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[124] *Id.* at 615.
[125] *Id.*
[126] *Id.* at 615, n. 11.
[127] *Weitzenhoff,* 35 F.3d at 1280 (citing Staples, 511 U.S. at 607).
[128] *Staples,* 511 U.S. at 610.
[129] *Id.* at 610-11 (internal quotes and citations omitted).
[130] *Id.* at 611.
[131] *Id.*

Additionally, the Court indicated that the authorized maximum punishment of ten years in prison supports its reading of the statute because a severe penalty attached to a statute is a "significant consideration" when considering whether the statute is public welfare legislation.[132] A severe penalty is a factor "tending to suggest that Congress did not intend to eliminate a *mens rea* requirement."[133] Offenses imposing severe penalties carry "the usual presumption that a defendant must know the facts that make his conduct illegal."[134]

Unlike the "long tradition of widespread lawful gun ownership by private individuals"[135] there is no long tradition of lawful release of pollutants into waters. Therefore, the likelihood of regulation is triggered for discharging pollutants into the waters. This distinction helps justify treating violations of the Clean Water Act as public welfare offenses, but not treating all gun violations as public welfare offenses.

Staples' claim of ignorance of the fact that his firearm had the capability to fire automatically is analogous to a polluter's claim of ignorance of the fact that he discharged a substance that was a pollutant. As discussed later, if a defendant discharges gasoline into water, but honestly and reasonably believed he was discharging water then a conviction may not stand.[136] This is true regardless of whether an offense is categorized as a public welfare offense.

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[132] *Id.* at 616.
[133] *Id.* at 618.
[134] *Id.* at 618-19.
[135] *Id.* at 610.
[136] *See Ahmad, supra.*

E. United States v. X-Citement Video.[137]

Shortly after deciding *Staples,* the United States Supreme Court decided *United States v. X-Citement Video*. This case is important because it discusses which facts the adverb "knowingly" modifies in a federal criminal statute. Therefore, it provides persuasive authority as to what "knowingly" modifies in section 1319(c)(2) of the Clean Water Act..

In this case, Rubin Gottesman, the owner and operator of a video company, sold and shipped pornographic videotapes that feature Traci Lords, a minor, to an undercover police officer.[138] The Government presented evidence at trial that indicated that Gottesman was fully aware that Lords was a minor when she performed on the videotapes.[139] Gottesman and his company were convicted of violating section 2252 of Title 18 created by the Protection of Children Against Sexual Exploitation Act of 1977.[140]

The U.S. Supreme Court identified the issue presented as "whether the term 'knowingly; in subsections (1) and (2) modifies the phrase "the use of a minor" in

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[137] 513 U.S. 64 (1994).

[138] *X-Citement Video, Inc.,* 513 U.S. at 66.

[139] *Id.* at 66.

[140] Specifically, 18 U.S.C. § 2252 (1988 ed. and Supp. V) states in pertinent part:

> (a) Any person who--
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains material which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> * * *
> shall be punished as provided in subsection (b) of this section.

X-Citement Video, Inc., 513 U.S. at 67-68 (quoting 18 U.S.C. § 2252 (1988 ed. and Supp. V).

subsections (1)(A) and (2)(A)."[141] While noting that the "most natural grammatical reading" suggests that the term modifies only the surrounding verbs and not the elements of the minority of the performers or the sexually explicit nature of the material, the court held that section 2252 was properly read to require that the defendant know that one of the performers was a minor and that the depiction was of sexually explicit conduct.[142]

The Court observed that to hold otherwise would "produce results that were not merely odd, but positively absurd."[143] To so hold would allow the conviction of defendants who "had no idea they were even dealing with sexually explicit material."[144] Examples of positively absurd results include: (1) an employee who returns an uninspected roll of developed film to a customer which happens to contain child pornography, (2) a new resident who knowingly receives mail that had been requested by a prior tenant without knowing the mail includes child pornography; and (3) a courier who delivers a box identified as "film" when it contains child pornography unbeknownst to the courier.[145] The Court assumed that Congress did not intend such results.[146]

In so holding, the Court relied on its landmark opinion in *Morissette*[147] which used the background presumption of evil intent to conclude that the term "knowingly" required that the defendant have knowledge that converted property belonged to the United States.[148] A brief discussion of *Morissette* will be helpful.

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[141] *X-Citement Video, Inc.*, 513 U.S. at 68.
[142] *Id.* at 68-69.
[143] *Id.* at 69. In his concurring opinion, Justice Stevens indicated that it would be "ridiculous" to "merely require knowledge that a 'visual depiction' has been shipped interstate commerce." *Id.* at 79-80 (Stevens, J., concurring).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *See* n.44 and accompanying text, *supra.*
[148] *X-Citement Video, Inc.*, 513 U.S. at 70 (citing *Morissette,* 342 U.S at 271).

Morissette was convicted of knowing conversion of property of the United States in violation of 18 U.S.C. section 641[149] for removing three tons of spent bomb casings from federal property that was extensively used for deer hunting.[150] After loading and transporting the metal bomb casings on his truck in broad daylight, Morissette crushed them with his tractor, again in broad daylight.[151] When questioned by authorities regarding his actions, Morissette voluntarily cooperated by telling the whole story, but stated that he did not intend to steal the bomb casings because he thought they were abandoned, unwanted worthless to the Government.[152] However, at trial, the judge did not permit Morissette to use the defense that he thought the bomb casings were abandoned.[153]

The isolated position of the word "knowingly" suggested that it only modified the verb "converts," and therefore only required that Morissette intentionally took control of the property.[154] However, the Morissette Court concluded the Government was required to prove that Morissette also knew the facts that made the taking a conversion, such as knowing that the property belonged to the United States.[155] By not permitting the jury to consider evidence of Morissette's claim that he thought the bomb casings were abandoned, the trial court may have allowed a conviction when the defendant had a good faith belief that the bomb casings were abandoned; in other words, when no real crime was committed.

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[149] The statute stated in pertinent part: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . shall be fined." 18 U.S.C. § 641, (cited in *Morissette,* 342 U.S. at 248, n. 2).
[150] *Morissette,* 342 U.S. at 247-48.
[151] *Id.* at 247.
[152] *Id.*
[153] *Id.* at 249.
[154] *X-Citement Video, Inc.,* 513 U.S. at 70.

Applying the principles from *Morissette, Liparota,* and *Staples,* the U.S. Supreme Court held that section 2252 is not a public welfare offense because people "do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation."[156] *Staples'* emphasis that harsh penalties are a significant factor weighing against dispensing with a scienter requirement indicates that "knowingly" modifies the age of the person depicted and the pornographic nature of the image because violations of section 2252 are punishable up to ten years imprisonment and substantial fines.[157]

The holding of *X-Citement Video* supports the proposition that a person must be aware of the operative facts that indicate that he discharged a pollutant into the waters of the United States in order to be found guilty of violating section 1319(c)(2) of the Clean Water Act. Just as the Government must prove under *X-Citement Video* that the defendant had to know that he was dealing with images of a person under the age of eighteen engaged in sexually explicit conduct, defendants charged under section 1319(c)(2) must know that they are discharging something that is a pollutant. Under this analogy, it is not necessary that a person know that the substance discharged is a pollutant because ignorance of the law is no excuse. It is only necessary that the defendant know what the substance is. It is necessary that the substance actually is a pollutant and not water, but it is not necessary that defendant know that the substance is a "pollutant" under

[155] *Id.* at 271.
[156] *Id.*
[157] *Id.* at 71-72 (citing 18 U.S.C. § 2252(b)).

the law. However, since nearly everything is a pollutant under the Clean Water Act,[158] this element of proof should be easy for the Government to prove.

IV. Evolution of Section 1319(c)(2) Cases Interpreting "Knowing"

A. United States v. Weitzenhoff[159]

Weitzenhoff was the first case under section 1319(c)(2) to be decided by a United States Court of Appeals. Until the *Ahmad* case was decided four years later, no court disagreed with it, and *Weitzenhoff* was widely presumed to be the law. It is still considered the leading case in this area.

In *Weitzenhoff,* a jury convicted the two managers of a sewage treatment plant in Hawaii of six counts under the Clean Water Act for knowingly discharging partially processed sewage directly into the ocean in violation of the plant's permit limits for total suspended solids and biochemical oxygen demand.[160]

Rather than hauling away excess waste activated sludge (WAS) to another treatment plant as they had done previously, the two managers instructed two employees to regularly dispose of the WAS by pumping it from the storage tanks directly into the ocean.[161] By doing so, the WAS bypassed the plant's effluent sampler so that samples taken did not reflect this discharge.[162]

At trial, the government produced evidence that about 436,000 pounds of pollutant solids were discharged into the ocean from April 1988 to June 1989, and those

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[158] *See* 33 U.S.C.S. § 1362(6) (LEXIS 2001) (In pertinent part, "pollutant" is defined by the Clean Water Act as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.").
[159] 35 F.3d 1275 (9th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995).
[160] *Id.* at 1281-82.
[161] *Id.* at 1282.
[162] *Id.*

discharges violated the plant's 30-day average effluent limitation under its permit for most of those months.[163] Most of the discharges occurred at night and both plant managers repeatedly denied there was a problem at the plant.[164] One of the employees testified that Weitzenhoff instructed him to not say anything about the discharges so that they could avoid problems.[165] Clearly, the evidence indicated that Weitzenhoff knew that he was engaged in conduct that was not innocent.

The two defendants relied on *Liparota v. United States*[166] to argue that the district court erred when it instructed the jury that the government did not have to prove they knew their acts or omissions were unlawful, and by failing to instruct the jury that it is a defense that they mistakenly believed their conduct was covered by their permit.[167]

After reviewing the legislative history of the 1987 amendment that changed the *mens rea* requirement in section 1319 from "willfully" to "knowingly," the Ninth Circuit concluded that "[b]ecause they speak in terms of 'causing' a violation, the congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[168]

The Ninth Circuit indicated that its conclusion "is fortified by decisions interpreting analogous public welfare statutes."[169] The court stated that "the leading case

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Liparota, supra* at nn. 67-90 and accompanying text.
[167] *Weitzenhoff,* 35 F.3d at 1283.
[168] *Id.* at 1284
[169] *Id.*

in this area" is *United States v. International Minerals & Chemical Corp.*[170] that "held that the term 'knowingly' referred to the acts made criminal rather than a violation of the regulation, and that 'regulation' was a shorthand designation for specific acts or omissions contemplated by the act."[171] Using this reasoning, the Ninth Circuit construed the language in section 1319(c)(2)(A) prohibiting the knowing violation of "any permit condition" as a "shorthand designation for specific acts" that violate the Clean Water Act.[172] The court also quoted *International Minerals* as follows:

> [W]here ... dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.[173]

The Ninth Circuit indicated that *Liparota* was a case involving a prosecution under 7 U.S.C. section 2024(b)(1), which punished anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamp] coupons or authorization cards in any manner not authorized by [the statute] or regulations."[174] The Ninth Circuit affirmed the convictions holding that the district court properly ruled that "knowingly violates" requires proof that the defendants knew they were discharging pollutants, but not requiring proof that they knew that their acts violated their permit.[175] The court concluded that the criminal provisions of the Clean Water Act are public welfare offenses, and that *International Minerals,* not *Liparota,* is controlling in this case because

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[170] 402 U.S. 558 (1971).
[171] *Weitzenhoff,* 35 F.3d at 1284 (citing *International Minerals & Chemical Corp.,* 402 U.S. at 560-62).
[172] *Id.* at 1285, n. 6. The Ninth Circuit noted that it followed *International Minerals* in *United States v. Hoflin,* 880 F.2d 1033 (9th Cir. 1989), *cert. denied,* 493 U.S. 1083 (1990) which held that knowledge of the absence of a permit is not an element of an offense under 42 U.S.C. § 6928(d)(2)(A) of the Resource, Conservation and Recovery Act. *Id.* at 1283.
[173] *Id.* at 1284 (quoting *International Minerals,* 402 U.S. at 565).
[174] *Id.* at 1285 (quoting *Liparota,* 471 U.S. at 420).
[175] *Id.* at 1283-84.

the statute was "clearly designed to protect the public at large from the potentially dire consequences of water pollution."[176]

The defendants petitioned for a rehearing *en banc.* The U.S. Supreme Court decided *Ratzlaf v. United States*[177] and *Staples v. United States*[178] while that petition was pending. The Ninth Circuit denied the petition for rehearing, but with a substantial five-judge dissent.[179] On the denial of the rehearing *en banc,* the panel amended its prior opinion to discuss the intervening cases.[180]

The Ninth Circuit distinguished *Staples* by distinguishing guns from the dumping of sewage and other pollutants into our nation's water. Unlike guns, "the dumping of sewage and other pollutants into our nation's water is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger."[181] Also, while *Staples* expressed some concern about offenses that carry felony-type penalties being labeled as public welfare offenses, the United States Supreme Court did not forbid the application of the public welfare offense doctrine to felonies.[182]

Additionally, the Ninth Circuit distinguished *Ratzlaf.* In *Ratzlaf,* the U.S. Supreme Court reversed a conviction for structuring unlawful cash transactions by holding that to commit the crime of "willfully violating" the law against structuring cash

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[176] *Id.* at 1286.
[177] 510 U.S. 135 (1994).
[178] 511 U.S. 600 (1994).
[179] *Weitzenhoff,* 35 F.3d at 1293-99 (Kleinfeld, J., dissenting). The opinion does not indicate how many judges considered the petition for an *en banc* hearing. Regarding the majority judges on the *en banc* petition, the opinion states only "[t]he petition for a rehearing en banc hearing was circulated to the full court" and "[l]ess than the required majority of the non-recused active judges voted to take the case en banc." *Id.* at 1281. There are currently 25 appellate judges on the Ninth Circuit Court of Appeals with three vacancies. Telephone Interview with Francis (Refused to Give Last Name), a clerk with The Ninth Circuit Court of Appeals (Jun. 29, 2001). However, the Ninth Circuit currently uses 11 judges to consider petitions for rehearing *en banc. Id.* Of course, five dissenting judges out of 11 leaves six for the majority.
[180] *Id.* at 1275.
[181] Weitzenhoff, 35 F.3d. at 1280.
[182] *Id.* at 1281, 1286

transactions to evade currency transaction reporting requirements, the defendant has to know of the reporting requirement and must have the specific intent to violate the law.[183] Because "currency structuring is not inevitably nefarious,"[184] the Court was not persuaded by the prosecution's argument that cash structuring is so obviously wrong that the "willfulness" element is satisfied whether or not the defendant knew that the cash structuring was illegal.[185] This case is not an exception to the rule that ignorance of the law is no excuse because Congress indicated that it is an excuse in the case of cash structuring offenses.[186]

The Ninth Circuit distinguished *Ratzlaf* because parties such as Weitzenhoff are closely regulated and discharge waste materials that affect public health, whereas the money structuring provision at issue in *Ratzlaf* could be violated for innocent reasons and was therefore not a public welfare offense.[187] Despite the five-judge dissent, since the U.S. Supreme Court denied certiorari, *Weitzenhoff* is the leading case on applying the knowledge element to Clean Water Act permit offenses.

B. United States v. Hopkins[188]

Another important case interpreting the knowledge element for permit offenses under the Clean Water Act is *United States v. Hopkins.* The Second Circuit decided this case in a manner consistent with the Ninth Circuit in *Weitzenhoff.*

The defendant was convicted of violating section 1319(c)(2)(A) of the Clean Water Act as well as other offenses because he exceeded the zinc limits in his

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[183] *Ratzlaf,* 510 U.S. at 137.
[184] *Id.* at 144.
[185] *Id.* at 146.
[186] *Id.* at 149.
[187] *Weitzenhoff,* 35 F.3d at 1280.
[188] 53 F.3d. 533 (2d. Cir. 1995), *cert. denied,* 516 U.S. 1072 (1996).

Connecticut issued NPDES permit.[189] On appeal, the defendant argued that the trial court erred by improperly instructing the jury on the knowledge element of the offenses charged and with giving a "conscious avoidance" instruction.[190]

The problems in this case arose from environmental problems at Spirol International Corporation ("Spirol") which was manufacturing metal shims and fasteners.[191] In the process of manufacturing, Spirol produced a great amount of wastewater containing zinc and other materials.[192] The wastewater was discharged into the Five Mile River.[193] The Connecticut Department of Environmental Protection (DEP) administered the Clean Water Act provisions under delegation from the United States Environmental Protection Agency (USEPA) that applied to discharges into the Five Mile River.[194] In 1987, the DEP entered into a consent order with Spirol which required Spirol to pay a fine of $30,000 for past zinc-related discharge violations and to comply with the discharge limitations specified in the order.[195] In 1989, the DEP modified Spirol's permit to discharge wastewater to impose stricter limits on the amount of zinc and other substances that Spirol was allowed to discharge into the river.[196]

The defendant, Robert H. Hopkins, was the vice-president of Spirol from 1987 to September 1990.[197] He signed the 1987 consent order on behalf of Spirol and was responsible for complying with the order and the permit.[198] The prosecution charged

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[189] *Id.* at 534.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 534-35.
[195] *Id.* at 535.
[196] *Id.*
[197] *Id.*
[198] *Id.*

Hopkins with deliberately tampering with Spirol's wastewater testing and falsifying reports to the DEP regarding zinc discharges from March 1989 to September 1990.[199]

The 1989 DEP permit required Spirol to collect a sample of its wastewater on a weekly basis, to send it to an independent laboratory by Friday, and to send the laboratory results to the DEP monthly.[200] The permit capped the concentrations of zinc in Spirol's wastewater at 2.0 milligrams per liter in any sample, and required a monthly average of 1.0 milligram per liter or less.[201]

In practice, wastewater samples were taken on Tuesdays, and were tested by Spirol employees before being sent to the independent laboratory.[202] If the zinc concentration of the sample taken contained less than 1.0 milligram per liter then the sample was sent to the independent laboratory.[203] However, if the sample exceeded that level, the sample was not sent to the laboratory.[204] Hopkins expressed concern to employees of Spirol that the company would be fined again if the company violated the permit.[205] Because of his concern, Hopkins ordered that samples that did not pass the in-house test for zinc concentration be discarded and directed his employees to take another sample on Wednesday.[206] Slightly more than sixty-nine percent (54 of 78) of the samples taken on Tuesdays were not sent to the laboratory.[207]

When Wednesday samples failed the in-house test, Hopkins either ordered that sample to be discarded and another sample taken on Thursday, but more frequently, he

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[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*

directed employees to dilute the sample with tap water or to reduce the zinc concentration in the sample by using a coffee filter.[208] If a Thursday sample failed to meet the 1.0 milligram of zinc per liter standard, Hopkins usually ordered employees to dilute or filter the sample.[209] If the Friday sample failed then it was always either diluted or filtered in order to meet the standard before being sent to the laboratory by the weekly Friday deadline.[210] On many occasions, in an attempt to obtain a sample that met the state permit standard, employees were ordered to take samples every day from Monday through Friday.[211] According to a Spirol employee, some of the samples that were sent to the laboratory contained more tap water than wastewater.[212]

During the charged time frame, Hopkins filed monthly discharge monitoring reports with the State EPA as required, and none of the reports indicated zinc concentrations higher than 1.0 milligram per liter.[213] On each report submitted, Hopkins certified under penalty of law that the information contained in the reports was "true, accurate and complete" to the best of his knowledge.[214]

Contrary to Hopkins' certifications, about forty percent of the samples were tampered with before being sent to the laboratory.[215] On about twenty-five to thirty times when a Spirol employee reported to Hopkins that he had actually succeeded in obtaining a satisfactory sample, Hopkins responded, "I know nothing, I hear nothing."[216] One Spirol employee, a master of the obvious, took the seemingly unnecessary step of telling

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[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 535-36.
[215] *Id.* at 536.
[216] *Id.*

Hopkins that the testing procedures being ordered were improper, but Spirol continued discharging wastewater into the river.[217]

With respect to the offense of knowingly violating the conditions of the state permit, the district judge instructed the jury:

> To reiterate, the government need not prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the specific requirements of the conditions and limitations of the permit. The government must prove, beyond a reasonable doubt, however, that in taking actions or causing actions to be taken, in violation of the permit, he acted voluntarily or intentionally and not by mistake, accident, ignorance of the facts, or for other innocent reason. The element of acting knowingly may also be satisfied if you find beyond a reasonable doubt ... that the defendant willfully or intentionally remained ignorant of relevant material facts.[218]

On appeal, Hopkins argued that the trial court should have instructed the jury that he could not be found guilty unless he knew he was acting in violation of the Clean Water Act or the State permit.[219] The Second Circuit rejected Hopkins' argument concluding that "the purpose and legislative history of § 1319(c)(2)(A) indicate that Congress meant that that section would be violated if the defendant's acts were proscribed, even if the defendant was not aware of the proscription."[220]

In arriving at this conclusion, the Second Circuit followed *International Minerals,* its own precedent in *United States v. Laughlin*[221] and relied on the change in the *mens rea*

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[217] *Id.*
[218] *Id.* at 536-37.
[219] *Id.*. at 537.
[220] *Id.* at 540.
[221] 10 F.3d 961 (2d Cir. 1993), *cert. denied,* 511 U.S. 1071 (1994) (court applied the "presumption of awareness of regulation" of *International Minerals* to uphold convictions under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)). Regarding RCRA, the Court held that the government must prove the defendant knew the nature of the hazardous waste matter with which he dealt, but need not prove that he knew the waste was identified or listed under RCRA or that he did not have a disposal permit. *Laughlin,* 10 F.3d at 966. Regarding CERCLA, the Court held that the government did not have to prove that the defendant was aware of the regulatory requirements to give agency notification of the discharge of a hazardous substance

requirement of section 1319(c)(2)(A) from willingly to knowingly. The court quoted from *International Minerals* for the "general rule that ignorance of the law is no excuse"[222] and for the often-cited rule that in a statute dealing with obnoxious waste materials, "knowingly violates" is shorthand for referring to the acts or omissions contemplated in the statute.[223]

The court also relied on *Laughlin* which relied on the "*International Minerals* 'presumption of awareness of regulation'"[224] in holding that "[section 6928(d)(2) of the Resource Conservation and Recovery Act] did not require the government to prove that the defendant knew that the waste he dealt with was identified or listed under RCRA or that he lacked a disposal permit," but "that the government need only prove that the defendant knew the nature of the hazardous waste matter with which he dealt."[225]

The Second Circuit found that the presumption of awareness of regulation applied to ground pollution in *Laughlin* to be equally applicable to water pollution.[226] The court noted that the "vast majority" of pollutants regulated under the Clean Water Act "are of a type that would alert any ordinary user to the likelihood of stringent regulation."[227] The court also noted that the fact that a governmental permit was issued increases the awareness of the holder of the permit of the existence of regulation.[228] In this case, the existence of a permit is a much stronger basis for presuming awareness of wrongdoing

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in a reportable quantity from a facility as soon as he had knowledge of the release. *Id.* at 967. The government only had to prove the defendant was aware of his actions. *Id.*

[222] *Hopkins,* 53 F.3d at 538 (quoting *International Minerals,* 402 U.S. at 563).

[223] *Id.*. (citing *International Minerals,* 402 U.S. at 560-62).

[224] *Hopkins,* 53 F.3d at 538.

[225] *Id.* (citing *Laughlin,* 10 F.3d at 966). Similarly, under CERCLA, *Laughlin* "held that the government was not required to prove that the defendant was aware of the regulatory requirements but only that he was 'aware of his acts.'" *Id.* (quoting *Laughlin,* 10 F.3d at 967) (the CERCLA reporting requirement at issue under 42 U.S.C. § 9603(a) was that a person in charge of a facility notify the agency "as soon as he has knowledge of any release (other than a federally permitted release).").

[226] *See Hopkins,* 53 F.3d at 538-39.

than the nature of zinc alone because it is clear that the permit set caps on concentration levels of zinc that could be included in the wastewater discharge from the Spirol plant. Of course, the fact that Hopkins signed the 1987 consent order on Spirol's behalf is an even stronger basis upon which to presume his awareness of wrongdoing.

Finally, the Second Circuit relied on the legislative history of section 1319(c)(2)(A) to support the conclusion that the Government does not need to prove that a defendant knew that his action was illegal in order to sustain a conviction.[229] "Though the congressional reports on the bills leading to the 1987 amendments do not expressly discuss the change from 'willfully' to 'knowingly,' they make clear that one goal of the amendments was to strengthen the criminal sanctions."[230]

The court noted that "[t]he International Minerals Court, in ruling that 'knowingly violates [ICC] regulations' did not require knowledge of the pertinent regulations, pointed out that if Congress had wished to require proof that the defendant knew his acts were unlawful, it could have used the word 'willfully.'"[231] The Second Circuit found the Supreme Court's observation "especially pertinent where Congress has amended a statutory provision, as it did with respect to section 1319(c)(2)(A), to change the *mens rea* element from 'willingly' to 'knowingly.'"[232] Therefore, the court inferred that Congress did not intend to require proof that a defendant knew his actions violated the law or the permit.[233]

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[227] *Id.* at 539.
[228] *Id.*
[229] *Id.*
[230] *Id.* The "prevalent interpretation of 'willfully'" means that a defendant intentionally violated a law that he knew existed. *Id.* at 540.
[231] *Id.* at 540.
[232] *Id.*
[233] *Id.*

C. United States v. Ahmad[234]

In *United States v. Ahmad,* the Fifth Circuit departed from the precedent set by the Ninth and the Second Circuits with a broad holding that went much further than necessary to decide the issue presented in the case. This case is considered "aberrational by many"[235] because it dismissed the reasoning in *Weitzenhoff* and *Hopkins.*

Ahmad, the owner of a gas station, was convicted of violating the Clean Water Act when he emptied an underground gasoline tank by pumping the contents into the street and also into a manhole.[236] Ahmad's gas station had two 8000-gallon underground gasoline tanks that each fed two gasoline pumps.[237] Ahmad discovered that one of his tanks had a leak at the top of the tank that allowed water to enter the tank and contaminate the gasoline—rendering him unable to sell from that tank.[238] Ahmad rented a water pump from a local hardware store after telling an employee of the store that he intended to use it to remove water from his yard.[239] Witnesses testified that they saw Ahmad pumping gasoline into the street.[240] From the street, the gasoline entered a storm drain and the storm sewer system, and flowed into a local creek that fed to the San Jacinto River and eventually to Lake Houston.[241] Ahmad also discharged some of the fluid into a manhole that flowed through the sanitary sewer system and to the city sewage

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[234] United States v. Ahmad, 101 F.3d. 386 (5th Cir. 1996).
[235] Jane F. Barrett & Jeanne M. Grasso, *The Changing Standard of "Criminal Intent,"* 13 NAT. RESOURCES & ENV'T 436, 437 (1998). [hereinafter Barrett & Grasso]. As Assistant United States Attorney in Baltimore, Maryland, Ms. Barrett argued for the United States in *Wilson. Wilson,* 133 F.3d at 253.
[236] *Ahmad,* 101 F.3d. at 388.
[237] *Id.* at 387.
[238] *Id.*
[239] *Id.* at 388.
[240] *Id.*
[241] *Id.* at 388.

treatment plant.[242] Ahmad pumped 5220 gallons of fluid from his leaky gas tank of which about 4690 gallons were gasoline.[243]

After initially maintaining that he did not use a pump, Ahmad admitted to using the pump, but maintained that he did not pump anything.[244] At trial, Ahmad did not dispute that he had discharged gasoline from the tank or even that the gasoline eventually made its way to the local creek and sewage treatment plant, but he asserted that he thought he was discharging water rather than gasoline.[245]

At trial, Ahmad requested that the district judge instruct the jury that knowledge was required for each of the five elements.[246] Instead, the judge instructed:

> For you to find Mr. Ahmad guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> (1) That on or about the date set forth in the indictment,
>
> (2) the defendant knowingly discharged
>
> (3) a pollutant
>
> (4) from a point source
>
> (5) into the navigable waters of the United States
>
> (6) without a permit to do so.[247]

On appeal, Ahmad argued that the judge abused his discretion by failing to instruct as requested. Ahmad argued that the phrase "knowingly violates" contained in section

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[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.* at 388-89.
[246] *Id.*at 389.
[247] *Id.*

1319(c)(2)(A) of the Clean Water Act "should read to require him knowingly to have acted with regard to each element of the offenses."[248]

The Fifth Circuit reversed the convictions based upon what was ruled to be flawed jury instructions to the effect that the jury could have convicted Ahmad even if it found that the defendant thought he was actually discharging water rather than gasoline.[249] The Fifth Circuit did not limit its holding to require the Government to prove that Ahmad knew that he discharged gasoline. The court held that section 1319(c)(2) of the Clean Water Act "require[s] knowledge as to each of its elements rather than only one or two. To hold otherwise would require an explanation as to why some elements should be treated differently from others, which neither the parties nor the case law seems able to provide."[250] According to the Fifth Circuit, the obvious inference for the jury was that knowledge was required for the act of discharge, but the instructions implied that strict liability, rather than knowledge, applied to the remaining elements.[251]

The Fifth Circuit relied on the Supreme Court's decision in *X-Citement Video*[252] for the "long-held view that 'the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct.'"[253] The Fifth Circuit interpreted *X-Citement Video* to hold that the "knowing"

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[248] *Id.* at 389-90.
[249] *Id.* at 390.
[250] *Id.*
[251] *Id.* at 391.
[252] 513 U.S. 64 (1994).
[253] *Ahmad,* 101 F.3d. at 390 (quoting X-Citement Video, Inc., 513 U.S. at 72). This appears to be a reference to the rule that the government must prove knowledge of all elements except for purely jurisdictional elements. *See* United States v, Wilson, 133 F.3d 251, 264, n. * (citing United States v. Feola, 420 U.S. 671, 676, n.9 (1975)). However, the Fifth Circuit failed to give any guidance regarding which elements are purely jurisdictional.

requirement applied to each element of a child pornography offense, not just to the element that gave the statute its "most natural grammatical reading."[254]

However, the U.S. Supreme Court's holding in *X-Citement Video* addressed only whether "knowingly" modified the minority age of the performers and the sexually explicit nature of their conduct—not to all of the elements of the offense.[255] The Fifth Circuit ignored the narrow holding of the Supreme Court in *X-Citement Video, Inc.* and expanded it in order to use it as authority for its expansive holding.

The Fifth Circuit also relied on its own case of *United States v. Baytank (Houston), Inc.*[256] which concluded that a conviction for knowing and improper storage of hazardous wastes[257] requires "that the defendant know[ ] factually what he is doing—storing, what is being stored, and that what is being stored factually had the potential for harm to others or the environment, and that he had no permit. . . ."[258] The court held that in section 1319(c)(2)(A), "knowingly" modifies the same elements as it found "knowingly" to modify in *Baytank* under 42 U.S.C. section 6928(d)(2)(A) of the Resource Conservation and Recovery Act—not just one or two of the elements.[259]

In *Ahmad,* the Government relied on *Weitzenhoff*[260] and *Hopkins*[261] to support their contention that it is required to "prove only that Ahmad knew the nature of his acts and that he performed them intentionally."[262] However, the Fifth Circuit found the government's reliance on these cases to be misplaced because neither of them directly

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[254] *Id.* at 390.
[255] *See* United States v. Murray, 52 MJ 423, 425 (2000).
[256] 934 F.3d 599 (5th Cir. 1991)
[257] *See* 42 U.S.C.S §6928(d)(2)(A) (LEXIS 2001).
[258] *Ahmad,* 101 F.3d. at 390 (quoting *Baytank,* 934 F.3d at 613).
[259] *Id.*
[260] *See* nn. 160-88 and accompanying text, *supra.*
[261] *See* nn. 188-233 and accompanying text, *supra.*
[262] *Ahmad,* 101 F.3d.at 390.

addressed the mistake of fact or statutory construction issues that were raised by Ahmad.[263]

In reaching its decision, the court dismissed the government's argument that violations of the Clean Water Act constitute public welfare offenses, and held that Ahmad's charged violations were not public welfare offenses.[264] Relying on *Staples,*[265] the court found the public welfare offenses exception is narrow, holding it only applies to cases where dispensing with the *mens rea* requirement would require the defendant to have knowledge only of traditionally lawful conduct.[266] The court noted that Ahmad's charged offenses possessed this characteristic, "for if knowledge is not required as to the nature of the substance discharged, one who honestly and reasonably believes he is discharging water may find himself guilty of a felony if the substance turns out to be something else."[267]

Unsound Rationale

It is not at all clear, however, that it is necessary to extend the *mens rea* requirement to all the remaining elements to prevent convictions for traditionally lawful conduct. The Fifth Circuit reasoned that gasoline is potentially harmful, but no more so than machine guns at issue in *Staples*. This comparison is weak because Ahmad's act of discharging gasoline created a "tremendous explosion hazard that could have led to hundreds, if not thousands, of deaths and injuries and millions of dollars of property damage."[268] The mere possession, as opposed to the firing, of a machine gun does not

[263] *Id.* at 390-91.
[264] *Id.* at 391.
[265] 511 U.S. 600, 618 (1994)
[266] *Ahmad,* 101 F.3d at 391.
[267] *Id.*
[268] *Id.* at 388.

create nearly the same potential harm. The court's analogy would be much stronger had Staples involved the firing of a machine gun rather than the mere possession of it because it is the fired bullets that may cause harm, just as discharged gasoline may cause harm. Additionally, in *Staples,* the common ownership of guns was given as a reason to not recognize possession of a machine gun as a public welfare offense. *Ahmad* did not involve the common act of storing gasoline, but rather the act of pouring gasoline down a manhole or into a street.[269] This is not a common occurrence that concerned the U.S. Supreme Court in *Staples.* Therefore, the Fifth Circuit's analysis that the violations of the Clean Water Act do not constitute public welfare offenses is unsound.[270]

The Fifth Circuit also concluded that violations of the Clean Water Act lead to serious penalties to lead against the conclusion they should be considered public welfare offenses. As noted by the Ninth Circuit, the U.S. Supreme in *Staples* did not adopt a definitive rule that felonies cannot be categorized as public welfare offenses.[271] The court's failure to categorize Ahmad's alleged offenses as public welfare offenses is a significant departure from the Second,[272] Eighth[273] and Ninth[274] circuits that have concluded that the Clean Water Act is a public welfare legislation.[275]

The Fifth Circuit reversed the conviction adding that the government need not prove that the defendants knew their conduct was illegal. It did heighten the bar for the

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[269] *Id.* at 387.
[270] Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Sep. 28, 2000).
[271] *Weitzenhoff,* 35 F.3d at 1286 (citing *Staples,* 511 U.S. 600, 618 (1994)).
[272] *Hopkins,* 53 F.3d at 540..
[273] *Sinskey,* 119 F.3d at 716.
[274] *Weitzenhoff,* 35 F.3d at 1286.
[275] In dicta in a case involving the prosecution under RCRA, the Sixth Circuit also indicated that the Clean Water Act constitutes public welfare legislation. United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 n. 4 (6th Cir. 1998) (dicta in a case involving a prosecution under RCRA).

prosecution by holding that it must prove knowledge of all elements except for "purely jurisdictional elements."[276]

However, the court failed to give any guidance regarding which elements are "purely jurisdictional."[277] According to Ray Mushal,[278] water of the United States is a purely jurisdictional element, but knowledge of the conditions of a permit is not. In the case of *X-Citement Video, Inc.,* the age of the performers was critical because it is legal to distribute sexually explicit material involving adults that is not obscene.[279] This is analogous to the Fifth Circuit's analysis of the narrow issue presented in *Ahmad:* whether "knowingly" applies to the element of the discharge of a "pollutant."[280] Since discharging water is innocent conduct, the Fifth Circuit correctly held that a defendant cannot be convicted if he honestly and reasonably believed that he was discharging water rather than gasoline. The feature of the substance that makes it a pollutant is that it is gasoline. The government is only required to prove that a defendant knew the substance was gasoline, i.e., the operative facts that make it a pollutant—not that the defendant knew that gasoline was a pollutant.[281] To require the defendant to know that gasoline is a pollutant would make ignorance of the law an excuse. Therefore, the Government's burden can be satisfied in this case by showing that Ahmad knew that he was discharging gasoline.

However, the knowing discharge of a known pollutant to the street or into a manhole is not otherwise innocent conduct. At the very least, it is littering. Since the

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[276] *Id.* at 391.
[277] *Id.* at 389-91.
[278] Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Sep. 21, 2000).
[279] *X-Citement Video, Inc.,* 513 U.S. at 72.
[280] *Ahmad,* 101 F.3d at 390.
[281] *Id.*

knowing discharge of a known pollutant to the street or into a manhole is not otherwise innocent conduct, the soundness of the Fifth Circuit's conclusion in *Ahmad* that knowingly modifies all the elements, not just one or two, is questionable at best.

D. United States v. Sinskey[282]

After *Ahmad,* the next United States Court of Appeals to decide the question of how far "knowingly" attaches under codified section 1319(c)(2) was the Eighth Circuit in *United States v. Sinskey.* Rather than follow the lone path blazed by the Fifth Circuit in *Ahmad,* the Eighth Circuit decided this case in a manner consistent with *Weitzenhoff* and *Hopkins.*

Timothy Sinskey was the plant manager and Wayne Kumm was the plant engineer of John Morrell & Company ("Morrell"), a large meat packing plant in South Dakota that created a great deal of wastewater in its processing.[283] Morrell treated some of its wastewater at its own treatment plant and sent some of it to a municipal treatment plant.[284] In treating the wastewater at its plant, Morrell reduced its concentration of ammonia nitrogen before discharging it into the Big Sioux River.[285]

The Environmental Protection Agency ("EPA"), which had permitting authority in South Dakota, issued an NPDES permit that required Morrell to limit the concentration of ammonia nitrogen in its discharged wastewater, to perform a series of weekly tests to monitor the amounts, and to file monthly reports of the test results with the EPA .[286] In the spring of 1991, Morrell doubled its slaughtering of hogs at the Sioux Falls plant.[287]

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[282] 119 F.3d 712 (8th Cir. 1997).
[283] *Id.* at 714.
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*

By increasing production, the plant increased the level of wastewater generated causing the concentration of ammonia nitrogen in the discharge to exceed the amount allowed by the permit.[288]

To cover up the violation, Morrell manipulated the production and testing processes so that it did not appear to be in violation of its permit by using two different techniques.[289] First, they used what they called "flow manipulation" or the "flow game" to discharge very low wastewater levels early in the week when they performed the tests required by the permit.[290] By discharging very low levels of wastewater, Morrell was discharging very low levels of ammonia nitrogen.[291] Later in the week after conducting the required tests, Morrell discharged an extremely high level of water, and therefore also an extremely high level of ammonia nitrogen.[292] By playing the flow game, Morrell was manipulating its test results so that they would not accurately reflect the amount of ammonia nitrogen that it discharged into the Big Sioux River.[293]

In addition to controlling the flow, Morrell also engaged in "selective sampling" by conducting more tests than were required by the EPA, but only reporting tests showing acceptable levels of ammonia nitrogen.[294] When these two techniques were unable to achieve satisfactory results, Morrell falsified the test results and monthly reports that were signed by Sinskey and then forwarded to the EPA from August 1991 to December 1992, except for one month.[295]

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[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*.

In response to their actions, Sinskey and Kumm were prosecuted for Clean Water Act crimes.[296] The jury convicted Sinskey of knowingly discharging a pollutant into waters in amounts over what the permit allowed in violation of section 1319(c)(2)(A), and it convicted both men of knowingly rendering an inaccurate monitoring method that was required by the Clean Water Act in violation of section 1319(c)(4).[297]

On appeal, Sinskey challenged the jury instructions regarding the charge that he knowingly violated a condition or limit of the permit.[298] He argued that since the adverb "knowingly" was the word preceding "violates" the government had to prove he knew that his conduct violated the Clean Water Act or the permit.[299] The trial court instructed the jury that to convict Sinskey, the government had to prove he was "aware of the nature of his acts, perform[ed] them intentionally, and [did] not act or fail to act through ignorance, mistake, or accident," and that "the government was not required to prove that Sinskey knew that his acts violated the CWA or permits issued under that act."[300]

In deciding this issue, the Eighth Circuit considered the generally accepted construction of the word "knowingly" in criminal statutes, the legislative history of the Clean Water Act and its own precedent of *United States v. Farrell,*[301] a case arising from the prosecution for possession of a machine gun.[302] The Farrell court analyzed 18 U.S.C. section 924(a)(2) which punishes one who "knowingly violates" section 922(o)(1) which prohibits the transfer or possession of a machine gun.[303] That court held that the word "knowingly" applied to the act of transferring or possessing a machine gun, but not to the

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[296] *Id.*
[297] *Id.* (citing 33 U.S.C. § 1319(c)(2)(A) and 33 U.S.C. § 1319(c)(4)).
[298] *Id.*. at 715.
[299] *Id.*
[300] *Id.*
[301] 69 F.3d. 891 (8th Cir. 1995), *cert. denied,* 516 U.S. 1181 (1996).
[302] *Sinskey,* 119 F.3d at 715 (citing *Farrell,* 69 F.3d at 892-93).

unlawfulness of those acts.[304] As a result, the government was not required to prove that the defendant knew his actions violated the law, but only that he was transferring a machine gun.[305] The Farrell court's analysis is consistent with the maxim that ignorance of the law is no excuse.

In *Sinskey,* the Eighth Circuit saw no reason to depart from generally accepted construction that "knowingly" applies to the underlying conduct, not to the law itself.[306] The court noted that Sinskey's argument facially appears to have merit because it appears that the conduct proscribed is violating a permit limitation—which implies that Sinskey knew about the permit limitation and knew he was violating it.[307] However, the court correctly observed that the permit is "another layer of regulation in the nature of a law, in this case, a law that applies only to Morrell."[308] Therefore, the Eighth Circuit asserted that the government must prove that Sinskey knew that he engaged in conduct resulting in a violation of the permit. In other words, the government was not required to prove that Sinskey knew that his conduct would result in a violation of the permit—but just that he knew he committed the conduct: specifically, that Morrell's discharges of ammonia nitrogen exceeded one part per million.[309] Hence, the government had to prove that Sinskey knew that he was discharging ammonia nitrogen at a concentration exceeding one part per million, but did not have to prove that Sinskey knew that he was violating the permit by doing so.[310]

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[303] *Id. Cf.* nn. 91-96 and accompanying text, *supra.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.* The question whether the government must prove that the defendant knew that the amount discharged exceeded the amount allowed in a permit has not been resolved by case law. This issue is "very

The court noted that its interpretation is consistent with the generally recognized rule that ignorance of the law is no excuse[311] and with the U.S. Supreme Court's interpretations of statutes that contain similar language and structure.[312] The Eighth Circuit indicated that the reasoning of *International Minerals*—specifically that "knowingly violate" is "merely a shorthand designation for punishing anyone who knowingly committed the specific acts or omissions contemplated by the regulations at issue"—applies with equal force to the Clean Water Act's regulation of discharges of byproducts of slaughtered animals into the public waters.[313] Additionally, the court indicated that additional reasoning of *International Minerals*—specifically that when "'dangerous or … obnoxious waste materials' are involved, anyone dealing with such materials 'must be presumed' to be aware of the existence of the regulations"—also applies with equal force to the Clean Water Act. [314]

As in *Weitzenhoff* and *Hopkins,* the Sinskey court also found the legislative history of section 1319(c)(2)(A) supported the view that a knowing *mens rea* relates to the act prohibited, not to knowing the underlying law or permit.[315] The basis for substituting "knowingly" for "willfully" was to strengthen the criminal sanctions for violating the Clean Water Act.[316] Congress substituted "knowingly" for "willfully" to strengthen the statute.[317] The court noted that "willfully" commonly means "acting with

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much up for grabs." Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Oct. 5, 2000).

[311] *Sinskey,* 119 F.3d at 716 (citing *Cheek v. United States,* 498 U.S. 192, 199 (1991)).

[312] *Id.* (citing *International Minerals & Chemical Corp.,* 402 U.S. 558 (1971)).

[313] *Id.* (citing *International Minerals & Chemical Corp.,* 402 U.S. at 562-63).

[314] *Id.* (quoting *International Minerals & Chemical Corp.,* 402 U.S. at 565).

[315] *Id.*

[316] *Id.*

[317] *Id.*

knowledge that one's conduct violates the law, while the word 'knowingly' normally means acting with an awareness of one's actions."[318]

The Eighth Circuit limited and distinguished *Ahmad* on the basis that it involved a mistake of fact defense rather than a mistake of law defense as asserted by Sinskey and Kumm.[319] Ahmad's defense that he thought he was discharging gasoline is a mistake of fact defense, whereas Sinskey and Kumm's defense that they did not know that they were violating the permit is a mistake of law defense.[320] However, the Eighth Circuit's analysis of *Ahmad* was limited to the specific issue presented to the Fifth Circuit and did not address the Fifth Circuit's broader holding[321] that the knowledge requirement attached to all elements except for jurisdictional elements. Since the Fifth Circuit failed to define which elements it considered jurisdictional elements, it is possible, but not likely, that the Eighth Circuit assumed that the Fifth Circuit would consider the permit element to be a jurisdictional element which the government need not prove the defendant was aware.

E. United States v. Wilson[322]

In the most recent United States Court of Appeals decision regarding "knowingly" in Clean Water Act prosecutions, the Fourth Circuit decided *United States v. Wilson,* a wetlands case, consistently with the Fifth Circuit's rationale in *Ahmad,* and

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[318] *Id.* While one commentator has observed that the Eighth Circuit did not attempt to use this legislative history to ascertain which actions a defendant must be aware, *see* Douglas L. McHoney, *The Clean Water Act's Mens Rea Requirement: Establishing a "Brighter Line" Test,* 6 Mo. Envtl. L. & Pol'y Rev. 24 (1999), such an attempt would appear to be fruitless since the legislative history is silent on this point. *See* H.R. Conf. Rep. No. 99-1001 (1986) and S. Rep. No. 99-50 (1985).

[319] *See Sinskey,* 119 F.3d at 717.

[320] *Id.*.

[321] *Ahmad,* 101 F.3d at 391 ("we hold that the offenses [charged under section 1319(c)(2)(A)] . . . are not public welfare offenses.").

[322] 133 F.3d. 251 (4th Cir. 1997).

reversed the defendant's convictions. Additionally, the Fourth Circuit went further than *Ahmad* by failing to indicate that the Government need not prove jurisdictional elements.

In February 1996, James J. Wilson, Interstate General Company, and St. Charles Associates were convicted of four counts of discharging fill material and excavated dirt into wetlands on four separate properties without a permit in violation of section 1319(c)(2)(A).[323] Wilson, who had been a land developer for over thirty years, was the chief executive officer and chairman of the board of directors of Interstate General.[324] He was the person responsible for many of the decisions that led to the convictions of himself and Interstate General and St. Charles Associates.[325]

Interstate General, a publicly traded land development company, and St. Charles Associates, a limited partnership that owned the land being developed within the planned community of St. Charles, were general partners.[326] The planned community of St. Charles is located between the Potomac River and the Chesapeake Bay in Charles County, Maryland.[327]

From 1988 to 1993, the defendants tried to drain three of the four properties by digging ditches.[328] All four of the parcels contained wetlands, but the defendants never obtained permits from the Army Corps of Engineers, the agency charged with issuing wetlands permits, prior to attempting to drain and fill the parcels.[329]

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[323] *Id.* at 254.
[324] *Id.*.
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.* In a process known as "sidecasting," they deposited excavated dirt next to the ditches. The defendants also transported a lot of fill dirt and gravel and placed it on three of the parcels. Only one of the parcels was subjected to sidecasting without the addition of fill. *Id.*
[329] *Id.*

At trial, the government presented testimonial and photographic evidence regarding the physical characteristics that identified the parcels as wetlands.[330] The evidence showed significant standing water, reports of vegetation typical to hydrologic soils, infrared aerial photographs that showed a pattern of stream courses visible beneath the vegetation.[331] Public documents such as county topographical maps and the National Wetlands Inventory Map also identified the parcels as containing wetlands.[332] Water from these parcels flowed in a drainage pattern that led to the Potomac River, a tributary of the Chesapeake Bay.[333] Evidence was presented that the defendants knew about the physical condition of the four parcels.[334]

The prosecution occurred as a result of the defendants' efforts to improve the drainage of the areas to make the development feasible.[335] A substantial amount of fill was subsequently added to raise the ground level of the land.[336] Repeated reshoring efforts were required because the wet ground would often shift and collapse.[337] Bids for work on one of the land parcels contained varying price quotes for wet and dry work.[338] Despite attempts to dry out the property by ditching and draining and also by pumping off standing water, and even after hundreds of truckloads of stone, gravel and other fill were added to three of the parcels, wetlands plants continued to sprout.[339]

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[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.* at 254-55.
[334] *Id.* at 255.
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.*

The Government presented evidence that the defendants retained a private consulting firm which told them that the parcels contained wetlands.[340] Their firm recommended that the defendants request permits from the Army Corps of Engineers before developing the land.[341] Charles County zoning authorities also notified the defendants about the possible presence of wetlands in the vicinity of the new construction projects.[342] Additionally, even when the defendants complied with an order issued by the Army Corps of Engineers to cease construction on one of the parcels and haul away fill dirt that had been added, they continued developing the other parcels without ascertaining whether a permit was required.[343]

The defendants claimed that it was unclear whether the parcels were wetlands under the Clean Water Act.[344] To support that position, they presented evidence that the Army Corps of Engineers was inconsistent in asserting jurisdiction over the parcels and that the Corps had acted on only one parcel even though it knew about the ongoing development for years.[345] The defendants also presented an internal Corps memorandum that questioned whether the areas were "waters of the United States" within the meaning of 33 U.S.C. section 1344.[346] The memorandum suggested obtaining guidance from higher authorities regarding what are "waters of the United States."[347]

The defendants also presented evidence that they legally drained three parcels prior to introducing fill, and that they did not discharge fill into the fourth parcel that was

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[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.* It is interesting that in the discussion of the evidence presented by the defense, the Fourth Circuit did not indicate whether the defendants offered expert testimony from their own consultant. *Id.*
[345] *Id.*
[346] *Id.*
[347] *Id.*

being drained by ditch digging.[348] The jury deliberated for fifteen hours before convicting the defendants of all four of the felony counts.[349]

On appeal, the defendants raised several issues including whether the trial court improperly instructed the jury on the criminal intent required by not requiring proof both that the defendants knew that their conduct was unlawful and also failing to require a "knowingly" criminal intent requirement for each element of the offense.[350] The district court instructed the jury that in order to convict the defendants that they must find:

> First, that is the defendant knowingly. . .discharged or caused to be discharged a pollutant.
>
> Second, that the pollutant was [dis]charged from a point source.
>
> Third, that the pollutant entered a water of the United States; and
>
> [F]ourth, that the discharge was unpermitted.[351]

Furthermore, the district court instructed the jury that an act was done "knowingly" "if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or other innocent reason."[352] For each felony charged, the district court instructed:

> the government must prove that the defendants knew, one, that the areas which are the subject of these discharges had the general characteristics of wetland; and two the general nature of their acts. *The government does not have to prove that the defendants knew the actual legal status of wetlands or the actual legal status of the material discharged into the wetlands. The government does not have to prove that the defendants knew that they were violating the law when they committed their acts.*[353]

The Fourth Circuit reversed the defendants' convictions. The court held that section 1319(c)(2)(A) requires the government to prove that the defendants knew of the

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[348] *Id.*
[349] *Id.*
[350] *Id.* at 260.
[351] *Id.* at 260.
[352] *Id.*

facts meeting each essential element of the substantive offense, however the government does not have to show the defendant knew that his conduct was prohibited by law.[354] The court held that the government must prove the following elements to sustain a felony conviction under the Clean Water Act:

> (1) that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges; (2) that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance; (3) that the defendant knew the method or instrumentality used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation; (5) that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States and (6) that the defendant knew he did not have a permit.[355]

Remarkably, in arriving at its holding, the Fourth Circuit cited *International Minerals* for the proposition that Congress intended that "knowing" accompany each element of section 1319(c)(2)(A).[356] The Fourth Circuit explained that inserting different scienter requirements for civil and other criminal penalties would require confusing repetitious drafting, and concluded that Congress used "knowingly violates" as a shorthand method of doing so.[357] The court ignored that the U.S. Supreme Court used the phrase "knowingly violates [applicable regulations]" as shorthand for knowingly committing the specific acts that violate the act—not as shorthand to say that knowingly attaches to every element of the statute.[358] Nothing in the *International Minerals* indicates that the word "knowingly" modifies every element of a criminal statute. In essence, the Fourth Circuit seized the word "shorthand" from the U.S. Supreme Court

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[353] *Id.* (emphasis added in opinion).
[354] *Id.* at 262.
[355] *Id.* at 264. (footnote omitted).
[356] *Id.* at 261.
[357] *Id.*

opinion and used it to help justify its conclusion, but did not follow *International Minerals.*

The Fourth Circuit relied on *Staples* to conclude that a defendant must "'know the *facts* that make his conduct illegal'[359] unless Congress clearly specifies otherwise."[360] The Court also relied on *X-Citement Video* for the rule that "knowledge must generally be proven with respect to each element of the offense."[361] Additionally, the Fourth Circuit relied on the legislative change of the Clean Water Act in the *mens rea* from "willingly" to "knowingly" to conclude that Congress did not intend to require that a defendant appreciate the illegality of his acts in order to be convicted.[362]

Unlike the Fifth Circuit in *Ahmad*, the Fourth Circuit detailed exactly what it requires for a conviction. The Fourth Circuit clarified that the government is not required to prove that a defendant either knew that permits were required or available, but must prove that he knew he did not have one.[363] The Fourth Circuit's requirement of knowledge of the lack of a permit is directly inapposite to the Ninth Circuit's conclusion in *Weitzenhoff* that it matters not "whether the polluter is cognizant of the requirement or even the existence of the permit"[364]

The Fourth Circuit's analysis also conflicts with the Second Circuit's decision in *Hopkins* as well as the Eighth Circuit's decision in *Sinskey.* The instructions given by the district court in *Wilson* clearly comply with the interpretations of the Second, Eighth and

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[358] *See id.* (quoting *International Minerals,* 402 U.S. at 562).
[359] *Id.* at 262 (quoting *Staples,* 511 U.S. at 605) (emphasis in original).
[360] *Id.* at 262.
[361] *Id.* (citing *X-Citement Video, Inc.,* 513 U.S. at 78).
[362] *Id.* This conclusion is the same one that all other federal circuit courts have reached when deciding this issue. *See* discussion of *Weitzenhoff,* at nn. 159-87, *supra*, *Hopkins,* at nn.188-233, *supra, Ahmad,* at nn. 234-81, *supra,* and *Sinskey*, at nn.282-321, *supra.*
[363] *Id.* at 264.
[364] *Weitzenhoff,* 35 F.3d at 1284.

Ninth Circuits, but the more conservative Fourth Circuit disagreed. While the Fourth Circuit rejected the defendants' argument that the prosecution must prove they knew that their conduct was illegal, it agreed that the trial court's instructions failed to properly hold the government to the burden of proving knowledge for each element of the statute.

The Fourth Circuit's interpretation of the knowingly requirement is the most stringent standard that has been imposed by any circuit court under the Clean Water Act. This is so for two reasons: (1) as a practical matter, it erroneously equates "knowingly" with the more demanding standard of "willfully," and (2) it requires knowledge of jurisdictional facts.

The Fourth Circuit explained that fifth element it required—"that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States"[365]—does not "fall into the category of 'jurisdictional facts' which . . . the government need not prove the defendant knew."[366] In this regard, the Court's conclusion that proof of knowledge is required for what appear to be jurisdictional facts raises the bar for the prosecution even higher than the Fifth Circuit did in *Ahmad* when it stated "with the exception of purely jurisdictional elements, the *mens rea* of knowledge applies to each element of the crimes."[367]

V. Jurisdictional Elements

The importance of jurisdictional elements is especially great in the Fifth Circuit where that Court has held that "[w]ith the exception of purely jurisdictional elements, the *mens rea* of knowledge applies to each element of the crimes."[368] Unfortunately, the

[365] *Wilson,* 133 F.3d at 264.
[366] *Id.* at 264, n. *
[367] *Ahmad,* 101 F.3d at 391.
[368] *Id.*

Fifth Circuit did not explain what elements are jurisdictional.[369] The consequences of the Fourth and Fifth Circuits decisions are clearer with an examination of what are and are not jurisdictional facts.

A. United States v. Feola[370]

In *United States v. Feola,* the U.S. Supreme Court decided the issue of whether the Government had to prove that the defendant knew that his victim was a federal officer to sustain a conviction for assaulting a federal officer under 18 U.S.C. § 111 or whether it was enough that the individual being assaulted was a federal officer unbeknownst to the assailant.[371] In other words, the Court decided whether that federal status of the officer was a jurisdictional fact that the Government need not prove.

Feola and his cohorts arranged for a sale of heroin to buyers who were really undercover agents for the Bureau of Narcotics and Dangerous Drugs.[372] The group planned to swindle the buyers by substituting sugar for heroin.[373] If the buyers demonstrated that they were wise to the ruse, Feola's group planned to steal the cash that the buyers brought for payment.[374] The plan failed when an agent drew his revolver in time to counter an assault upon another agent from behind.[375] Rather than reaping the

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[369] *Id.*
[370] 420 U.S. 671 (1975).
[371] § 111. Assaulting, resisting, or impeding certain officers or employees.
"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $ 5,000 or imprisoned not more than three years, or both." *Feola,* 420 U.S. at 673, n.1 (quoting 18 U.S.C. § 111). "Among the persons 'designated in section 1114' of 18 U. S. C. is 'any officer or employee . . . of the Bureau of Narcotics and Dangerous Drugs.'" *Id.*
[372] *Feola,* 420 U.S. at 674.
[373] *Id.*
[374] *Id.*
[375] *Id.*

benefits of their planned drug rip-off, Feola and friends were charged with conspiring to assault, and with assaulting, federal officers.[376]

Without objection from the defense, the trial judge instructed the jury that "it is not necessary for the government to prove that the defendants or any of them knew that the persons they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed and conspired to commit an assault."[377]

To determine whether the instruction correctly instructed the jury that the government did not have to prove the defendants knew that the persons they were going to assault were federal agents, the Court considered the legislative intent of the statute. "If the primary purpose is to protect federal law enforcement personnel, that purpose could well be frustrated by the imposition of a strict scienter requirement. On the other hand, if § 111 is seen primarily as an anti-obstruction statute, it is likely that Congress intended criminal liability to be imposed only when a person acted with the specific intent to impede enforcement activities."[378] The Court concluded that it was "plain that Congress intended to protect *both* federal officers and federal functions," and that, "rejection of a strict scienter requirement is consistent with both purposes."[379]

After examining the legislative history of section 111, the U.S. Supreme Court concluded that Congress intended to require only "an intent to assault, not an intent to assault a federal officer."[380] The Court so held in order to "effectuate the congressional

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[376] *Id.* at 675.
[377] *Id.* at 675, n. 7.
[378] *Id.* at 678.
[379] *Id.* at 679 (emphasis in original).
[380] *Id.* at 684. "Congress may well have concluded that § 111 was necessary in order to insure uniformly vigorous protection of federal personnel, including those engaged in locally unpopular activity." *Id.*

purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts."[381]

The Court indicated that scienter of a factual element that confers federal jurisdiction is unnecessary for a conviction.[382] The Court held that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."[383] "Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."[384]

In a subsequent decision, the U.S. Supreme Court stated that *Feola* implied that "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[385] This means that courts should not blindly apply a *mens rea* requirement to every element of a criminal statute. This requirement for "clear analysis" runs contrary to the view of the Fourth and Fifth Circuits that the criminal provisions of the Clean Water Act require knowledge as to each element[386] and the supporting rationale that "[t]o

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Likewise, Congress concluded the Clean Water Act was necessary to "restore and maintain. . . the integrity of the Nation's waters," an objective not popular in all areas. *See* 33 U.S.C.S. § 1251(a) (LEXIS 2001).

[381] *Id.*

[382] *Id.* at 676.

[383] *Id.* at 676-77, n. 9.

[384] *X-Citement Video, Inc.,* 513 U.S. at 72, n.3 (citing *Feola,* 420 U.S. at 685).

[385] United States v. Bailey, 444 U.S. 394, 406 (1980) (citations omitted). (in a case involving prosecutions for escape from federal custody under 18 U.S.C. § 751(a), the Supreme Court held that the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission and that the prosecution need not prove that the defendants intended to avoid confinement).

[386] *Wilson,* 133 F.3d at 264; *Ahmad,* 101 F.3d at 390.

hold otherwise would require an explanation as to why some elements should be treated differently from others."[387]

B. United States v. Yermian[388]

In *United States v. Yermian,* a 5-4 opinion involving the prosecution of a false statement under 18 U.S.C. section 1001, the U.S. Supreme Court decided whether the Government had to prove that the defendant knew that he made his false statement in a matter involving federal agency jurisdiction. This case sheds some light on the question of whether the scienter requirement applies to jurisdictional elements.

At trial, Yermian admitted that he knew that he submitted false responses on a to Department of Defense Security Questionnaire.[389] He explained that he submitted the false responses so that they would be consistent with similar false statements he had made on his employment application.[390] At trial, Yermian claimed in his defense that he did not know that his false statements would be transmitted to a federal agency.[391] Upon discovery of his false statements, he was charged with making a false or fraudulent false or fraudulent statement in a matter within the jurisdiction of a federal agency in violation of 18 U.S.C. section 1001.[392]

The U.S. Supreme Court held that the Government did not have to prove actual knowledge of federal agency jurisdiction.[393] The Court found that the requirement in section 1001 that the false statement be made "in any matter within the jurisdiction of any

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[387] *Ahmad,* 101 F.3d at 390.
[388] 468 U.S. 63 (1984).
[389] *Yermian,* 468 U.S. at 66.
[390] *Id.*
[391] *Id.*
[392] *Id.* at 65. The relevant language of § 1001 provides "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined. . . ." *Id.* at 64, n. 1. (quoting 18 U.S.C. § 1001).
[393] *Yermian,* 468 U.S. at 75.

department or agency of the United States," is a "jurisdictional requirement" because "[i]ts primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern."[394] The Supreme Court indicated that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense."[395] The language of section 1001 clearly shows that Congress did not intend the *mens rea* terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element because the jurisdictional language is in a separate phrase.[396] The plain language of the statute establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements," and not the initial requirement that the false statements be made in a matter within the jurisdiction of a federal agency.[397]

C. United States v. Murray[398]

United States v. Murray, a case recently decided by the United States Court of Appeals for the Armed Forces, sheds some light on the question of whether the scienter requirement applies to jurisdictional elements.

Staff Sergeant Murray was convicted of a specification of unlawful receipt of sexually explicit depictions of minors from the Internet.[399] On appeal, he argued that his conviction was not legally sufficient because the Government failed to prove that he

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[394] *Id.* at 68.
[395] *Id.*
[396] *Id.* at 69.
[397] *Id.*
[398] 52 MJ. 423 (2000).
[399] Murray was convicted under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, which incorporates offenses prohibited by the United States Code such as 18 U.S.C. § 2252(a)(2) at issue in this case as it was in *X-Citement Video, Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 60c(4)(b) (2000 ed.).

knew the sexually explicit depictions of minors passed through interstate commerce.[400] However, the United States Court of Appeals for the Armed Forces stated that *United States v. X-Citement Video* took a "'narrower view,' holding that 'knowingly' in [section] 2252[401] applies to the 'sexually explicit nature of the material and to the age of the performers.'"[402] The Court found that "[t]he Supreme Court did not specifically interpret the [child pornography] statute to extend the knowledge requirement to interstate commerce in its analysis of the elements, nor has any other court."[403] The Court rejected Murray's argument that the Government was required to prove that he knew the pictures passed through interstate commerce, because it held that the interstate commerce requirement is jurisdictional.[404]

D. Comment

Feola, Yermian and *Murray* provide authority by analogy for the proposition that the knowing scienter requirement does not apply to jurisdictional elements. Of these cases, *Murray* is the most directly on point with section 1319(c)(2) because the *mens rea* requirement of knowingly precedes the jurisdictional requirement in section 1319(c)(2) as well as the child pornography statute, 18 U.S.C. § 2252(a).[405] The Murray Court's analysis that the interstate commerce requirement is a jurisdictional element is persuasive

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[400] *Murray,* 52 MJ at 425.

[401] Any person who –

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(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including computer, . . ., if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such depiction is of such conduct;. . . .

Id. at 424-25 (quoting 18 U.S.C. 2252(a)(2)).

[402] *Id.* at 425 (quoting *X-Citement Video,* 513 U.S. at 78 (1994)), *see* footnotes 137-58, *supra,* and accompanying text.

[403] *Id* at 426.

[404] *Id.*

authority for the proposition that waters of the United States is also a jurisdictional element which the Government is not required to prove.

According to Ray Mushal,[406] "navigable waters"[407] is a purely jurisdictional element.[408] It makes sense that "navigable waters" is a jurisdictional element because it provides the interstate commerce connection required under the Commerce Clause.[409] Without an interstate commerce connection, arguably there would be no basis for federal jurisdiction in the Clean Water Act.[410] Therefore, the requirement that a pollutant be

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[405] *See* 33 U.S.C. § 1319(c)(2) at n.1, *supra.*

[406] *See* footnote 16, *supra.*

[407] The Clean Water Act defines "navigable waters" as "waters of the United States and the territorial seas." 33 U.S.C S. § 1362(7) (LEXIS 2001). However, the Clean Water Act does not define "waters of the United States." To fill the void, the EPA and the United States Army Corps of Engineers ("Corps") promulgated regulations which identically define the phrase. The regulations state that "waters of the United States" includes "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs . . . the use degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 C.F.R. § 328.3(a)(3) (LEXIS 2001) (Corps' regulation); 40 C.F.R. § 230.3(s)(3) (LEXIS 2001) (EPA's regulation). However, the continuing legal survival of these regulatory definitions is in doubt. *See* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (in a 5-4 decision authored by Chief Justice Rehnquist, the Supreme Court held that section 404(a) of the Clean Water Act may not be extended over an abandoned sand and gravel pit which provides habitat for migratory birds because "33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.").

[408] Ray Mushal, Environmental Crimes Lecture at the George Washington University Law School (Sep. 21, 2000).

[409] *See* U.S. Const., Art I, § 8, cl. 3. The report of the House of Representatives accompanying the proposed bill that resulted in the 1972 Amendments to the Clean Water Act said that the House Committee "fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 131 (1972). This statement was repeated by the House-Senate Conference Committee in its report on the bill as enacted. H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 144 (1972). *See* Marjorie A. Shields, Annotation, *What Are "Navigable Waters" Subject to Federal Water Pollution Control Act,* 160 ALR Fed 585, 598 (2000).

[410] *See* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S.Ct. 675 (2001) where the majority did not reach the question whether Congress could exercise federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3 because it found that the Migratory Bird Rule exceeded Congressional authority granted in § 404(a) of the CWA. *See also, id.* at 688 (Stevens J., dissenting) ("Why should Congress intend that its assertion of federal jurisdiction be given the 'broadest possible constitutional interpretation' if it did not intend to reach beyond the very heartland of its commerce power? The activities regulated by the CWA have nothing to do with Congress' 'commerce power over navigation.' Indeed, the goals of the 1972 statute have nothing to do with *navigation* at all.").

discharged into the navigable waters of the United States should be considered a jurisdictional element of section 1319(c)(2).

VI. Post-Wilson Cases

After reviewing the landmark cases discussing "knowingly" in Clean Water Act prosecutions and the cases discussing jurisdictional facts, an examination of cases that have been decided since *Wilson* is appropriate for further guidance on the direction of the law in this area.

A. Supreme Court Cases

1. United States v. Bryan:[411] "Knowingly" versus "Willingly"

Although not an environmental crimes case, *United States v. Bryan* can be used as additional authority in favor of the position that section 1319(c)(2) does not require the government to prove that the defendants knew that they were violating a statute or regulation and that the knowing requirement does not apply to permits.

Sillasse Bryan was convicted of conspiracy to violate 18 U.S.C. section 922(a)(1)(D) by willfully engaging in the business of dealing in firearms as well as a substantive violation of that statute.[412] At trial, the evidence showed that Bryan lacked a federal license to deal in firearms and that he used "straw purchasers" in Ohio to get

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[411] 524 U.S. 184 (1998).

[412] *Bryan,* 524 U.S. at 189-90. Specifically, Title 18, U.S.C. § 924(a)(1) provides:

> Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—
> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
> (B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;
> (C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or
> (D) willfully violates any other provisions of this chapter,
> shall be fined under this title, imprisoned not more than five years, or both.

pistols that he could not obtain on his own.[413] The straw purchasers made false statements when they purchased the guns, and Bryan assured them he would file the serial numbers off the guns.[414] Bryan then sold the guns on street corners in Brooklyn, New York.[415] Although no evidence was presented to show that Bryan knew about the federal law prohibiting one from dealing in firearms without a license, the evidence clearly proved that Bryan knew his conduct was unlawful.[416]

After both sides rested at trial, Bryan motioned the trial judge to instruct the jury that he could not be convicted unless he knew of the federal licensing requirement.[417] The judge declined and gave the following explanation of "willfully":

> A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.[418]

On appeal, Bryan argued that the evidence was insufficient and that the trial judge erred by failing to instruct the jury that knowledge of the federal licensing requirement was an essential element of the offense.[419] Previously, the U.S. Supreme Court indicated that a "willful" violation of a statute requires the Government to "prove that the defendant acted with knowledge that his conduct was unlawful."[420] To the contrary, Bryan argued that more was required in his case because Congress used the word "knowingly" to authorize

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[413] *Id.* at 189.
[414] *Id.*
[415] *Id.*
[416] *Id.*
[417] *Id.*
[418] *Id.*
[419] *Id.*
[420] *Id.* at 192 (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

punishment of three categories of offenses under the statute and the word "willfully" to refer to dealing in firearms without a license.[421]

The U.S. Supreme Court rejected Bryan's argument that a Government must shoulder a special burden in his case.[422] In doing so, the Court distinguished "knowing" conduct from "willful" conduct. With approval, it cited Justice Jackson's observation that "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law."[423] "[U]nless the text of the statute indicates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."[424] While it is true that section 1319(c)(2) makes it a crime to knowingly violate certain statutory sections,[425] the doctrine of *International Minerals* that "knowingly violates [regulations]" is shorthand for knowingly committing the acts that result in a violation, rather than knowingly violating the law, the text of section 1319(c)(2) does not indicate a different result.[426]

Bryan argued that 18 U.S.C. section 924(a)(1)(D) requires knowledge of the law because of the Supreme Court's interpretation of the "willfully" in the context of tax law where it was held that a jury "must find that the defendant was aware of the specific provision of the tax code that he was charged with violating"[427] and in the context of banking law where it was held that "the jury had to find that the defendant knew that his

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[421] *Id.*
[422] *Id.*
[423] *Id.* (quoting Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) (Jackson, J., dissenting)).
[424] *Id.* at 193. (footnote omitted).
[425] *See* 33 U.S.C. § 1319(c)(2) at footnote 29, *supra.*
[426] *International Minerals,* 402 U.S. at 563-64; *see supra* at footnotes 52-68.
[427] *Id.* at 193-94. (quoting Cheek v. United States, 498 U.S. 192, 201 (1991)). The tax laws at issue in *Cheek* were 26 U.S.C. § 7201 and 26 U.S.C. § 7203. Section 7201 provides that any person "who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" shall be guilty of a felony. *Cheek,* 498 U.S. at 193 (quoting 26 U.S.C. § 7201). Under 26 U.S.C. § 7203, "any

structuring of cash transactions to avoid a reporting requirement was unlawful."[428] However, the U.S. Supreme Court indicated that those cases are "readily distinguishable" because they involve "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct."[429] The Court noted that "[t]his special treatment of criminal tax offenses is largely due to the complexity of the tax laws."[430] Furthermore, "[c]urrency structuring is not inevitably nefarious" and knowledge of the law is necessary to prevent criminalizing apparently innocent activity.[431]

In light of *Bryan,* it appears that even though a defendant may not have known that he was violating a permit condition or statutory or regulatory requirement, i.e., violating the law, that prosecutors only need to prove that a defendant was aware of his actions to obtain a conviction.[432] "Knowingly" as articulated by the U.S. Supreme Court in *Bryan* does not approach the stringent standard imposed by the Fourth Circuit in *Wilson.*[433] By requiring the government to prove that the defendant knew that he did not have a permit,[434] the Fourth Circuit elevated "knowingly" to the level of "willfully." This is inconsistent with the Supreme Court's interpretation of "knowingly" in *Bryan* as

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person required under this title . . . or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return" shall be guilty of a misdemeanor. *Id.* (quoting 26 U.S.C. § 7203).

[428] *Id.* at 194 (citing *Ratzlaf,* 510 U.S. at 138, 149). "In response to the Court's decision in *Ratzlaf,* Congress amended the provision to eliminate the applicability of the provision's *mens rea* requirement to offenses committed under 5324. *See* 31 U.S.C. 5322(a) (1994)." Note, *Mens Rea in Federal Criminal Law,* 111 HARV. L. REV. 2402, 2406, n. 40 (1998).

[429] *Bryan,* 524 U.S. at 194.

[430] *Id.* (quoting *Cheek,* 498 U.S. at 200).

[431] *Id.* at 195 (quoting *Ratzlaf,* 510 U.S. at 144).

[432] Barrett & Grasso, *supra* at n. 235, at 438.

[433] *Id.* at 438.

[434] *Wilson,* 133 F.3d at 264.

"factual knowledge as distinguished from knowledge of the law."[435] However, *Bryan* sheds no light on what evidence a defendant must have known in order to convict.[436]

2. United States v. Hanousek:[437] More Public Welfare Offense Doctrine

On January 10, 2000, the U.S. Supreme Court denied Edward Hanousek's petition for writ of certiorari for the Ninth Circuit.[438] However, unlike most writ denials, two justices, Justice Thomas and Justice O'Connor dissented.[439] Although it is simply a writ denial, it is the only word from the Supreme Court whether the criminal provisions of the Clean Water Act constitute public welfare legislation.

In 1994, Hanousek was a roadmaster of a railroad.[440] As a roadmaster, he supervised a rock quarrying project in Alaska.[441] The roadmaster was responsible "for every detail of the safe and efficient maintenance of the entire railroad."[442] A month before Hanousek took over responsibility for the project, an independent contractor hired by the railroad covered about 300 feet of the 1000 feet of petroleum pipeline at the work site with railroad ties, sand and ballast material to protect the pipeline as was customary.[443] After Hanousek assumed responsibility for the project, with the exception of a movable backhoe work platform,[444] nothing was done to protect the unprotected 700 feet of pipeline.[445]

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[435] *Bryan,* 524 U.S. at 192.
[436] Barrett & Grasso, *supra* at 438.
[437] United States v. Hanousek, 528 U.S 1102 (2000).
[438] *Id.* at 1102.
[439] *Id.* (Thomas, J., dissenting).
[440] *Id.* at 1102.
[441] *Id.*
[442] United States v. Hanousek, 176 F.3d 1116, 1119 (9th Cir. 1999), *cert. denied,* 528 U.S. 1102 (2000).
[443] *Hanousek,* 176 F.3d at 1119.
[444] The movable backhoe work platform was used "to load a train with rocks," but was not otherwise described in the Ninth Circuit's opinion. *Id.*
[445] *Id.*

A backhoe operator who was employed by an independent contractor accidentally struck an unprotected petroleum pipeline near the railroad tracks while removing rocks.[446] As a result, the pipeline ruptured and spilled between 1000 and 5000 gallons of oil into the river.[447] At the time of the spill, Hanousek was at home and off duty.[448]

Hanousek did not dispute that he knew about the pipeline or that he knew about the potential harm that could be caused when a piece of heavy machinery broke the pipeline.[449] He was convicted under codified section 1319(c)(1)(A) of the Clean Water Act[450] for negligently discharging oil into the navigable water of the United States.[451]

The Ninth Circuit Court of Appeals rejected Hanousek's argument that it would violate his due process rights to convict him for ordinary negligence by discharging oil into the river.[452] The Court reasoned, in part, that the criminal provisions of the Clean Water Act "constitute public welfare legislation"[453] which is "designed to protect the public from potentially harmful or injurious items,"[454] and may criminalize "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[455]

Noting that the Courts of Appeal are divided on the issue of whether the Clean Water Act is a public welfare statute, Justice Thomas wrote in dissent that he thinks "it is

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[446] *Id; Hanousek,* 528 U.S at 1102.
[447] *Id.*
[448] *Id.*
[449] *Hanousek,* 176 F.3d at 1122.
[450] Codified section 1319(c)(1)(A) provides that anyone who "negligently [violates certain provisions of the Clean Water Act] shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. 18 U.S.C.S. § 1319(c)(1)(A) (LEXIS 2001). Codified section 1321(b)(3) prohibits "[t]he discharge of oil … into or upon the navigable waters of the United States." 18 U.S.C.S. § 1321(b)(3) (LEXIS 2001).
[451] *Hanousek,* 528 U.S at 1102.
[452] *Id.*
[453] *Hanousek,* 176 F.3d at 1121 (citing *Weitzenhoff,* 35 F.3d at 1286).
[454] *Id.* (citing *Staples,* 511 U.S. at 607).
[455] *Id.* (quoting *Liparota,* 471 U.S. at 433).

erroneous to rely, even in small part, on the notion that the [Clean Water Act] is a public welfare statute."[456] The fact that the Clean Water Act "imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities" "strongly militates against concluding that the public welfare doctrine applies" to the Clean Water Act.[457] Justice Thomas, joined by Justice O'Connor, reasoned that the severity of the penalties imposed by the criminal provisions of the Clean Water Act "counsels against concluding that the [Clean Water Act] can be accurately classified as a public welfare statute."[458]

In denying certiorari, the U.S. Supreme Court let stand the Ninth Circuit's rationale that since "[t]he criminal provisions of the [Clean Water Act] are clearly designed to protect the public at large from the potentially dire consequences of water pollution,"[459] it is public welfare legislation. This rationale is inconsistent with the Fifth Circuit's holding that the Clean Water Act is not public welfare legislation.[460] The fact that the Supreme Court refused to grant review of *Hanousek* does not bode well for the future viability of the requirement set forth in *Ahmad* and *Wilson* that the government prove that the defendant knew that he did not have a permit.

B. Other Federal Cases

1. United States v. Ellis:[461] Applying Wilson in the Fourth Circuit

[456] *Hanousek,* 528 U.S at 1103.
[457] *Id.*
[458] *Id.* at 1104.
[459] *Hanousek,* 176 F.3d at 1121 (quoting Weitzenhoff, 35 F.3d at 1286).
[460] *Ahmad,* 101 F.3d at 391.
[461] United States v. Ellis, No. 98-4150, 1999 U.S. App. LEXIS 2690 (4th Cir. Feb. 22, 1999).

United States v. Ellis was the first Fourth Circuit case to apply *Wilson* as precedent. The court reassured the Government that not every failure to instruct the jury in accordance with *Wilson* will result in reversal of a conviction on appeal.

Kerry Ellis was owner and president of a salvage yard located on the Baltimore Harbor, one of the nation's busiest commercial harbors, along the Patapsco River.[462] The evidence was "incontrovertible that Ellis made his living profiting from those waters."[463] He purchased decommissioned Navy vessels, demolished them into scrap metal, and then sold the scrap to interested parties.[464]

Based on the testimony of several of Ellis' employees, it was clear that he knew his employees were dumping debris and oil into the harbor and that he knew his permit status.[465] At trial, several workers testified that Ellis told them to wash all demolition debris down the deck drains of the ships into the river, including petroleum products that would create a sheen on the water.[466] Two workers "testified that it was the standard operating practice to treat any petroleum sheen created in the water near the demolition site with dishwashing liquid to eliminate the sheen."[467] Ellis did not contest the truthfulness of any of the testimony.[468]

Testimony from an environmental consultant revealed that workers hosed off the decks thereby creating a sheen on the water and that the consultant told Ellis that dumping that created a sheen on the water was a violation of federal regulations.[469] Ellis

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[462] *Id.* at *2.
[463] *Id.* at *34.
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] *Id.*
[468] *Id.*
[469] *Id.* at *35-*36.

challenged neither the consultant's credibility nor the accuracy of his testimony.[470] Furthermore, Ellis never offered an exhibit that purported to be a permit to dump debris of any kind into the water.[471]

When instructing the jury at trial, the district court defined "discharge of a pollutant," "pollutant," "point source," and "person" for the jury.[472] The district court also instructed the jury that "[t]he term knowingly means that an act was done voluntarily and intentionally and not because of a mistake, accident, negligence, or some other innocent reason."[473] The court continued by instructing the jury that "the government must prove that the defendants knew the general nature of the materials that were being discharged and the nature of their acts. The government does not have to show that the defendants knew the legal status of the materials being discharged or that they were violating the law."[474] The court concluded its instructions regarding knowledge by instructing:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken.[475]

The Fourth Circuit found the instructions to be similar to the instructions given to the jury in *Wilson.*[476] Applying the holding in *Wilson,* the court held that the lower court erred and that the "jury should have been given more specific instructions indicating that

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[470] *Id.* at *36.
[471] *Id.*
[472] *United States v. Ellis,* U.S. App. LEXIS 2690 at *29-*30.
[473] *Id.* at *30.
[474] *Id.*
[475] *Id.*
[476] *Id.* at *30-*31.

knowledge was the appropriate *mens rea* requirement for all elements of the crime."[477] The court held that the instructions were inadequate under *Wilson* because they "did not adequately impose on the government the burden of proving knowledge with regard to each statutory element."[478] The court held that the erroneous jury instructions given during Ellis' trial "prevented the jury from making a factual finding on the *mens rea* required for each element of the crime."[479]

The court decided that it was plain error for the lower court to instruct that "the defendants knowingly discharged or caused to be discharged a pollutant from a point source into waters of the United States without a permit," but the court sustained the conviction.[480] Since the court found the evidence of Ellis' knowledge to be "simply overwhelming," the judge's failure to instruct the jury on the knowledge requirement is not reversible error because it did not affect "the integrity, fairness, or public reputation of the judicial process."[481] The court found that no miscarriage of justice occurred because it was clear that Ellis understood the nature of his property—a salvage yard on Baltimore Harbor.[482]

The court found that Ellis' case is not like *Wilson,* in which "the real possibility existed that the landowner was unaware that his property was a wetland or was connected to the waters of the United States."[483] The court soundly reasoned that since "Baltimore Harbor is perhaps the quintessential example of a water of the United States, and it is

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[477] *Id.* at *31.
[478] *Id.* at *32 (quoting *Wilson,* 133 F.3d at 265).
[479] *Id.* at *32.
[480] *Id.* at *29.
[481] *Id.* at *33 ; *see* Johnson v. United States, 520 U.S. 461, 469 (1997) ("[A]n appellate court must . . . determine whether the forfeited error seriously affects the fairness, integrity or public reputation of judicial proceedings before it may exercise its discretion to correct the error.") (internal quotation marks omitted).
[482] *Id.* at 34.
[483] *Id.*

incontrovertible that Ellis made his living profiting from those waters," reversal to allow a re-examination of whether Ellis "knew his property was along a harbor or that Baltimore Harbor was a water of the United States in the face of such overwhelming evidence would be a nonsensical exercise at great public expense."[484]

The evidence was also overwhelming to show that Ellis knew that his employees were discharging pollutants into Baltimore Harbor or that Ellis knew the permit status.[485] Ellis never entered an exhibit at trial that purported to be a permit to dump debris of any kind into the water, but the evidence was uncontested that he told his employees "to wash all demolition debris down the deck drains of the ships into the river, including petroleum products that would create a sheen when they hit the water."[486]

Although it is not a reported case, *Ellis* gives insight into what facts the Fourth Circuit requires the Government to prove to convict a defendant at trial and to affirm the conviction on appeal. In this case, evidence clearly showed that Ellis knew that Baltimore Harbor was a navigable water, that he was discharging debris into it, that he knew his actions violated federal regulations, and that he knew his permit status. It also serves to assure the Government that not all cases that were tried before the Fourth Circuit decided *Wilson* are destined for reversal because of inadequate jury instructions.

2. United States v. Metalite Corp:[487] In Accord with Weitzenhoff

Faced with a defendant trying to use ignorance of the Clean Water Act as an excuse, the Metalite Corp. court refused to the defendant's invitation to make new law in this area.

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[484] *Id.*
[485] *Id.* at *35.
[486] *Id.* at *35-*36.

The defendants were in the business of manufacturing aluminum reflector lighting fixtures by using an aluminum anodizing process. The aluminum anodizing process generated wastewater that allegedly contained lead and other metals and phosphoric, nitric and sulfuric acids. They were charged with the unpermitted discharge of wastewater through an underground storm water drain pipe into a surface channel which eventually led to the Ohio River. Specifically, the defendants were indicted for "knowingly discharging and causing the discharge of a pollutant, chemical wastes and industrial process wastewater, from a point source, the storm water drain pipe and surface channel, into waters of the United States without a NPDES permit."[488]

After being indicted, the defendants moved to dismiss on multiple grounds, including that the indictment failed to charge that they acted with specific intent in violating the Clean Water Act under section 1319(c)(2)(A).[489] They argued that the word "knowingly" modifies "violates" in section 1319(c)(2)(A) thereby requiring the government to prove "specific intent—i.e., that the defendants knew that their acts violated the law."[490] The Government responded that the Clean Water Act should be construed as the United States Supreme Court interpreted a knowing violation of ICC regulations in *International Minerals.*[491]

On July 28, 2000, in another unpublished opinion, the United States District Court of the Southern District of Indiana rejected the defendant's argument that the Clean Water Act requires knowledge of the law in order to convict.[492] The court relied on its

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[487] United States v. Metalite Corp., NA 99-008-CR-B/N, 2000 U.S. Dist. LEXIS 11507 (S.D. Ind.,July 28, 2000).
[488] *Metalite Corp.,* U.S. Dist. LEXIS 11507, at *2.
[489] *Id.* at *4.
[490] *Id.* at *6.
[491] *Id.*
[492] *Id.*

Seventh Circuit Court of Appeals' precedent in *United States v. Wagner*[493] to interpret the holding of *International Minerals:* "a defendant would not be excused from criminal liability under a public welfare statute even if he had no idea of the existence of the law he broke, for ignorance of the law is no excuse and knowledge of the regulation was not required."[494]

The Metalite Corp. court started its analysis with the plain language of the statute.[495] The court noted "[a]lthough the words knowingly violate seem clear in the context of [section] 1319(c)(2)(A) itself, their meaning is less clear when read as a whole."[496] However, the court indicated that when the administrative, civil and criminal enforcement provisions of the Clean Water Act are read as a whole that it is likely that Congress intended "knowingly violates [certain sections]" to mean knowingly violate "specific acts or omissions which violate the Act."[497] The court stated that the conclusion "that the words 'knowingly violates' do not create a specific intent crime appears to depend on one or both of two factors: 1) the principle that ignorance of the law is no excuse; and 2) the public welfare doctrine."[498]

The court reasoned that when Congress amended the Clean Water Act's *mens rea* requirement from "willful" to "knowing" that it did not intend to require a specific intent to break the law because "'willfulness' requires "an act in conscious disregard of a known duty, whereas 'knowingly' designates a lack of mistake or accident and an awareness of actions that make up a violation of the law."[499]

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[493] 29 F.3d 264, 266 (7th Cir. 1994)
[494] *Metalite Corp.,* U.S. Dist. LEXIS 11507, at *6 (internal quotation marks omitted).
[495] *Id.* at *7.
[496] *Id.*
[497] *Id.*at *8 (quoting International Minerals, 402 U.S. at 562).
[498] *Id.* at *9.
[499] *Id.* at *12.

The court indicated that courts use the public welfare doctrine "in a variety of ways to justify a lack of knowledge requirement when the inherently dangerous or harmful nature of the defendant's activity should put him on notice that laws and regulations will apply to the conduct."[500] While acknowledging that the Clean Water Act's regulation of potentially hazardous substances and toxic wastes resembles a public welfare statute, the court expressed reservation for labeling the Clean Water Act as a public welfare statute because it prohibits discharging "seemingly innocuous substances that ordinary people may not know are considered 'pollutants,' such as sand or rocks."[501]

The Metalite Corp. court indicated that regardless of the rationale (either ignorance of the law is no excuse or the public welfare doctrine) no federal circuit court addressing the Clean Water Act's criminal intent requirement has required the government to prove that a defendant knew he was violating the law or a permit to be convicted under section 1319(c)(2)(A).[502]

VII. Recommendation

Offenses imposing severe penalties carry "the usual presumption that a defendant must know the facts that make his conduct illegal."[503] Since section 1319(c)(2) imposes maximum penalties consisting imprisonment for three years and a fine of $50,000 per day of violation, it clearly imposes severe penalties. Therefore, proving a violation of section 1319(c)(2) should require the Government to prove that the defendant knew the facts that make his conduct illegal.

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[500] *Id.* at *12-13.
[501] *Id. at *18* (citing 18 U.S.C. § 1362(6) (defining "pollutant")).
[502] *Id.* at *19.
[503] *Id.* at 618-19.

Determining the mental state required for committing a federal crime requires a court to interpret the construction of the statute and infer congressional intent.[504] The 1987 amendment to the Clean Water Act which reduced the *mens rea* requirement from "willingly" to "knowingly" while simultaneously increasing the offense to felony status indicates that Congress was serious about deterring potential polluters. Since the offense requires a "knowingly" rather than a "willingly" *mens rea* requirement, there is no requirement that a defendant actually know that his actions violate the law. To convict under section 1319(c)(2)(A),[505] the government should have to prove:

> (1) the defendant knew that he was discharging a substance (the discharge was intentional and not accidental);[506]
>
> (2) the defendant knew the basic identity of the substance discharged (for example, he knew that the substance was gasoline rather than water);[507]
>
> (3) the defendant knew that the discharge was facilitated by a specific means (an additional and related requirement is that the "specific means" is a "point source" as defined by 33 U.S.C. § 1362(14));[508]
>
> (4) the defendant knew that he discharged a pollutant into public waters or wetlands (an additional and related requirement is that the "public waters or wetlands" constitute "navigable waters" as defined by 33 U.S.C. § 1362(7));[509] and

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[504] *Staples,* 511 U.S at 605.

[505] To convict under section 1319(c)(2)(B), the requirements should be the same except that (4) would be that "the defendant knew that he discharged a pollutant into a sewer system or into a publicly owned treatment works and also knew or should have known that the pollutant could cause personal injury, property damage or cause the treatment works to violate any effluent limitation or permit condition."

[506] Because ignorance of the law is no excuse, the Government need not prove that the defendant knew that his actions constituted a discharge under law.

[507] Because ignorance of the law is no excuse, the Government need not prove that the defendant knew that the substance he discharged is actually a pollutant under law.

[508] Because ignorance of the law is no excuse, the Government need not prove that the defendant knew that the particular item he used as a point source is actually a point source under law.

[509] Because ignorance of the law is no excuse, the Government need not prove that the defendant knew that the public waters into which he discharged pollutants constitute navigable waters of the United States under law. Also, since the scienter requirement does not attach to jurisdictional elements, *see Murray, supra* at 55-56, the Government should not have to prove the defendant knew that the waters into which he discharged a pollutant were "navigable waters" under law.

(5) that the defendant discharged the pollutant without a permit or in violation of a permit.

Under the above-stated recommendation, all that is required is knowledge of the facts which render the pollutant, point source or navigable water as such by law. Otherwise stated, "[t]he government need prove only that the defendant knew the operative facts which make his action illegal."[510] To require the government to prove that a defendant actually knew that a pollutant, point source or navigable water was such under the law would be to make ignorance of the law an excuse.

However, the same does not hold true for jurisdictional elements. Since the requirement that the pollutant be discharged into "navigable waters" is a jurisdictional element,[511] the Government should not be required to prove the operative facts which render the waters or wetlands as "navigable waters" under the law. All that should be required is that the Government prove that the defendant knew that he discharged the substance into a public water or wetland.

For example, if the Government proves that the defendant knowingly discharged zinc into a river, it is no defense that the defendant did not know that zinc is a pollutant. If the defendant knew that he discharged the zinc from a pipe leading to the river, it is no defense that the defendant did not know that the pipe is a point source or that he did not know that the river constitutes navigable waters. Since ignorance of the law is no excuse, the Government should not be required to prove that the defendant discharged a pollutant from a point source into navigable waters with knowledge that the discharge either violated the permit or was made without a permit. Since the permit is the individual law applicable to the defendant, ignorance of the permit is no excuse. Since obtaining a

[510] *Wilson,* 133 F.3d at 264.

permit is a legal prerequisite to discharging pollutants into navigable waters, knowledge of the requirement to obtain a permit is not required.

VIII. Conclusion

The first few cases to interpret the new section 1319(c)(2) of the Clean Water Act ruled that it is public welfare legislation. The Second,[512] Eighth[513] and Ninth[514] Circuits have concluded that the Clean Water Act is a public welfare statute;[515] whereas the Fifth[516] Circuit has held that it is not. Courts have ruled that the Clean Water Act is a "public welfare offense" because the criminal provisions of the Clean Water Act are "clearly designed to protect the public at large from the potentially dire consequences of water pollution."[517] In holding that the criminal provisions of the Clean Water Act do not constitute "public welfare offenses," the Fifth Circuit stated that the "public welfare offense exception is narrow" and cited the tough maximum felony penalties attached to section 1319(c)(2).[518]

The confusing distinction between general intent and specific intent[519] and the nebulous public welfare offense doctrine to create disagreement about what the prosecution must prove that a defendant knew in order to convict him of violating codified section 1319(c)(2) of the Clean Water Act. It is interesting that the conservative

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[511] *See* footnotes 402-06 and accompanying text, *supra.*
[512] *Hopkins,* 53 F.3d at 540..
[513] *Sinskey,* 119 F.3d at 716.
[514] *Weitzenhoff,* 35 F.3d at 1286.
[515] United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 n.4 (6th Cir. 1998) (dicta in a case involving a prosecution under RCRA).
[516] *Ahmad,* 101 F.3d at 391.
[517] *Hopkins,* 53 F.3d at 540 (quoting *Weitzenhoff,* 35 F.3d at 1286).
[518] *Ahmad,* 101 F.3d at 391.
[519] *See* United States v. Bailey, 444 U.S. 394, 403 (1980) (The "venerable distinction" between a general intent and specific intent "has been the source of a good deal of confusion.").

Fourth Circuit, hardly a bastion of the rights of the criminal accused,[520] has set the rule in favor of polluters while the more liberal Ninth Circuit has set the rule in favor of the environment. Perhaps underlying the rulings of the Fourth and Fifth Circuit is the antiquated assumption that "the earth is so vast and nature is so powerful that nothing we can do can have any major or lasting effect on the normal functioning of its natural systems."[521]

Oliver Wendell Holmes stated over 100 years ago that "the life of the law has not been logic; it has been experience."[522] Experience has shown that "to admit the excuse (mistake of law) at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[523]

The antiquated assumption that "the earth is so vast and nature is so powerful that nothing we can do can have any major or lasting effect on the normal functioning of its natural systems"[524] must not be perpetuated. The "chemical, physical, and biological integrity of the Nation's waters"[525] must be protected from polluters, and potential polluters must be sufficiently deterred. Ignorance should be no sanctuary for those who place greed over bothering to comply with the Clean Water Act.

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[520] *See* United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (where a voluntary confession under the Due Process Clause was obtained in technical violation of the judicially created rule of Miranda, the admissibility of the confession in federal court was found to be governed by statute, not Miranda), *rev'd,* 530 U.S. 428 (2000) (a 7-2 opinion authored by Chief Justice Rehnquist, with Justices Scalia and Thomas dissenting, the Supreme Court ruled that Miranda announced a constitutional rule that Congress could not supersede legislatively, and following the rule of *stare decisis*, the court declined to overrule Miranda).
[521] AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 6 (1993).
[522] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
[523] *Id.* at 48.
[524] AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 6 (1993).
[525] 33 U.S.C.S. § 1251(a) (LEXIS 2001).

Violating the Clean Water Act is not a passive act. At the very least, violating the Clean Water Act requires an action which the perpetrator commits at his own peril. The landmark cases involve cases in which the defendants were charged with discharging pollutants into navigable waters.[526] Before discharging pollutants into navigable waters, the pollutant should bear the burden of ensuring his actions are lawful. Otherwise, potential violators would be discouraged from educating themselves about the legality of their actions. Intentional disregard for the legality of polluting cannot be condoned. Courts should not tolerate the "I know nothing" defense. A polluter who pollutes in violation of his permit or without a required permit cannot be considered innocent in the eyes of the law because he chooses to be ignorant of legal requirements.[527] To require the government to prove that a defendant knew that his actions were in violation of his permit or that a defendant knew that his actions were done without a permit would be to require a proof of a defendant's specific intent to violate the law when the statute only requires general intent.

Courts outside of the Fourth and Fifth Circuits should not adopt the faulty reasoning of *Wilson* and *Ahmad.* However, it is unnecessary for courts to rely on the

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[526] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1282 (9th Cir. 1994) (discharge of waste activated sludge into Pacific Ocean without treatment in violation of NPDES permit), *cert. denied,* 513 U.S. 1128 (1995); United States v. Hopkins, 53 F.3d 533 (2d. Cir. 1995) (discharge into Five Mile River of wastewater containing concentrations of zinc at levels exceeding those allowed by state permit), *cert. denied,* 516 U.S. 1072 (1996); United States v. Sinskey, 119 F.3d 712, 714 (8th Cir. 1997) (discharge into Big Sioux River of wastewater containing concentrations of ammonia nitrogen at levels exceeding those allowed by NPDES permit); United States v. Ahmad, 101 F.3d 386, 388 (5th Cir. 1996) (unpermitted discharge of gas into street which led to storm drain, then storm sewer system and then flowed through a pipe to Possum Creek which feeds into the San Jacinto River which flows into Lake Houston); United States v. Wilson, 113 F.3d 251, 253 (4th Cir. 1997) (unpermitted discharge of fill and excavated materials into wetlands).

[527] *Cf.* Manual for Courts-Martial, Part IV, ¶ 37(c) (11) (2000 ed.) ("An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as the one who has actual knowledge."), and United States v. Stringfellow, 32 M.J. 335 (CMA 1991) (an accused who ingests what he believes is cocaine alone may be convicted of

nebulous public welfare doctrine to hold that the government need not prove the defendant's knowledge of the permit condition violated or that the defendant knew he had no permit. The rule that ignorance of the law is no excuse, the legislative history of section 1319(c)(2) and the purpose of the Clean Water Act provide the rationale necessary to hold that the defendant's knowledge of the permit is irrelevant without relying on the public welfare offense doctrine.

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using cocaine and another drug when he was unaware that the cocaine he knowingly ingested contained another controlled substance.).